No. 87-1613

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NATIONAL TREASURY EMPLOYEES UNION,
Petitioner,

v.

CONSTANCE HORNER, Director,
Office of Personnel Management

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

LOIS G. WILLIAMS *
Director of Litigation

ELAINE KAPLAN
Assistant Counsel for Litigation

NATIONAL TREASURY EMPLOYEES UNION
1730 K Street, N.W., Suite 1100
Washington, D.C. 20006
(202) 785-4411
Counsel for Petitioners

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the ethical prohibition against "fee splitting" precludes unions and other non-profit organizations from recovering attorney's fees at prevailing market rates under the Equal Access to Justice Act, where the Act expressly provides that fees shall be calculated at market rates and where all of the fees are placed in a fund used solely to provide legal services.

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CONSTANCE HORNER, Director,
Office of Personnel Management

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The National Treasury Employees Union (NTEU) petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case, concerning its request for an award of attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(A).

OPINIONS BELOW

The Order of the court of appeals (App., *infra*, 1a-10a) determining NTEU's application for attorney's fees is reported at 805 F.2d 384. The Order of the court of appeals denying respondent's petition for rehearing (*id.* at 11a) is unreported. The decisions of the court of appeals on the merits (*id.* at 13a-16a) and the arbitrator's decisions on merits (*id.* at 17a-42a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 1986. A petition for rehearing was denied on December 9, 1986. Upon application of petitioner, the time for filing a petition for a writ of certiorari was extended to April 8, 1987, by order of Chief Justice Rehnquist. The jurisdiction of this Court is invoked under 28 U.S.C. 1251(1).

RELEVANT STATUTORY PROVISIONS

28 U.S.C. 2412(d)(2)(A) provides:

> For the purposes of this subsection—
>
> "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee).

STATEMENT

1. Petitioner National Treasury Employees Union (NTEU) is a non-profit association that functions as a federal sector labor organization pursuant to the Civil Service Reform Act, 5 U.S.C. 7101 *et seq.* In addition to attorneys and non-lawyer field representatives, NTEU employs lobbyists, public relations employees, insurance specialists and support staff.

As one of its services, NTEU provides attorneys to members and other bargaining unit employees on a discretionary basis in personnel related proceedings under the Civil Service Reform Act (CSRA). NTEU employs salaried in-house staff attorneys to litigate these individual cases and to litigate collective federal employee interests before both administrative and judicial tribunals.

All attorney's fees recovered by its salaried staff attorneys are paid to the NTEU Legal Services Program. None of the fees are commingled with the union's general revenues. The funds from the Legal Services Program are used solely to pay the actual expenses of providing legal services. None of the funds are used to accomplish other NTEU goals.

2. This case concerns NTEU's right to recover attorney's fees at prevailing market rates under the Equal Access to Justice Act (EAJA). The case arose out of NTEU's successful representation of an employee of the Internal Revenue Service (IRS), Zazenda Smith, in proceedings before the United States Court of Appeals for the Federal Circuit. The IRS had discharged Smith for making false statements and falsifying documents. NTEU invoked arbitration on Smith's behalf (5 U.S.C. 7121(b)(3)(C)) and the Arbitrator reduced the penalty to an eleven-month suspension. Thereafter, the Office of Personnel Management (OPM) intervened in the case, moved for reconsideration of the Arbitrator's decision, and upon denial of the motion, filed a petition for review with the Federal Circuit.[1]

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[1] Under 5 U.S.C. 7121(f) and 7703(d), the Director of OPM has the authority to petition for review of an arbitrator's decision in the Federal Circuit "if the Director determines, in his discretion, that the [arbitrator] erred in interpreting a civil service law, rule, or regulation affecting personnel management and the [arbitrator's] decision will have a substantial impact on a civil service law, rule, regulation or policy directive."

NTEU staff attorneys filed briefs and presented oral argument on behalf of Smith in opposition to OPM's petition in the Federal Circuit. The court of appeals affirmed the Arbitrator's decision. It concluded, as NTEU had argued, that OPM's appeal was improper because OPM had failed to show that the arbitrator's decision involved the misapplication of a civil service law and would have a substantial impact on the civil service law. App., *infra*, at 15a-16a, citing *Devine* v. *Sutermeister*, 724 F.2d 1558 (Fed. Cir. 1983); *see* note 1, *supra*.

3. NTEU filed an application for an award of attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412, for work done before the court of appeals. NTEU requested that the fees be awarded at prevailing market rates, not to exceed $75 per hour, as specifically provided in the EAJA. 28 U.S.C. 2412(d)(2)(A). NTEU stated in its application that any fees awarded would go directly into its separate legal services fund.[2]

The court below held that NTEU was entitled to recover attorney fees under the EAJA because OPM did not show that its position was substantially justified or that special circumstances would make an award of fees unjust. *See* 5 U.S.C. 2412(d)(1)(A).[3] The court however, rejected NTEU's request that its fees be calculated

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[2] NTEU created a separate legal services fund in 1981, after the court of appeals for the D.C. Circuit ruled that it would be unethical for the union to commingle attorney fee awards paid at market rates with the funds in its general treasury, which were used for other, non-legal purposes. *See, Curran* v. *Department of the Treasury*, 805 F.2d 1406, 1408 (9th Cir. 1986), citing *National Treasury Employees Union* v. *Department of Treasury*, 656 F.2d 848 (D.C. Cir. 1981).

[3] The court explained that in *Devine* v. *Sutermeister*, it had already cautioned OPM that appeals concerning the propriety of an Arbitrator's mitigation of the penalty in individual cases involve "'precisely the type of issue which OPM should not petition for review'" under 5 U.S.C. 7703(d). App. *infra* at 16a, quoting *Devine* v. *Sutermeister*, *supra*, 724 F.2d at 1566.

at prevailing market rates, as they had been in *Sutermeister, supra*, and as provided under the EAJA. Despite the explicit language of the EAJA, mandating awards of fees to be paid at "prevailing market rates," the court of appeals held that NTEU could recover only the actual costs of litigation—overhead expenses and attorney salaries. It ordered NTEU to submit the cost, based on salary, of each attorney who worked on the case, and its overhead in connection with the case. App., *infra* at 10a.[4]

In limiting NTEU to cost based fees, the court relied on its earlier decision in *Goodrich* v. *Department of the Navy*, 733 F.2d 1578 (Fed. Cir. 1984), *cert denied*, 469 U.S. 1189 (1985) (which concerned the award of fees under the Back Pay Act, 5 U.S.C. 5596(b)(1)(A)(ii)), and on related administrative decisions. In *Goodrich*, the court held that ethical principles forbidding fee splitting and the unauthorized practice of the law, precluded a union that provides legal counsel from receiving market rate fees, even where, as here, those fees are deposited into a separate account that is used only for litigation.

The *Goodrich* court had purported to base its rule against permitting unions to recover market rate fees on the D.C. Circuit's holding in *NTEU* v. *Department of the Treasury*, 656 F.2d 848 (1981). In that case, which arose under the attorney fees provision of the Privacy Act, the D.C. Circuit held that ethical principles prohibiting fee-splitting and the unauthorized practice of law prevented NTEU from recovering market rate fees and depositing them into its general revenues, where they could be used for any purpose. The court noted, however, that the ethical problem might be resolved by establishment of a separate fund to be used solely for litigation. 656 F.2d at 855. Thereafter, NTEU established its fund,

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[4] As a result of the court's limitation of fees, the award was reduced from $13,781.25 (fees calculated at market rate, capped at $75 per hour) to $5,965.12 (fees calculated based on "cost"). App., *infra* at 12a.

in response to the concerns voiced by the D.C. Circuit in *NTEU* v. *Department of Treasury*.

Nonetheless, in *Goodrich* the court ruled that establishment of a separate fund did not eliminate the ethical problem. It stated that: "By reducing the amount of its general funds the union is required to use to provide legal services, the payment to the fund of legal fees that exceed the union's expenses of providing the services would result in the union's indirectly utilizing legal fees for its ordinary expenses." 733 F.2d at 1580. This "indirect benefit" the court believed, would be the equivalent of unethical fee splitting.

The court of appeals concluded in the instant case that the *Goodrich* rule was equally applicable to awards of fees under the EAJA. Without elaboration, it stated that "the fact that the EAJA expressly provides that fee awards shall be based on prevailing market rates" does not "persuade us that fee awards to unions should not be limited to costs incurred." Nor did the court "find compelling Congress' intent that regardless of whether the attorney on the case charges less than the prevailing market rate that that attorney should nonetheless receive the prevailing market rate." App., *infra* at 8a, citing S. Rep. No. 253, 96th Cong., 1st Sess. 17 (1979). By way of explanation it observed that "Congress was also concerned, of course, about not overburdening the public fisc, and limited the hourly rate to a maximum of $75 per hour, obviously below the rate charged by a number of law firms." *Id.*[5]

The court opined (without deciding) that an award of prevailing market rate fees to a union might be appropriate under two circumstances: 1. where the union established a separate fund that was fully supportive of its litigation activities, or 2. where market rate fees

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[5] NTEU did not apply for fees in excess of $75 per hour.

were awarded to the staff attorneys themselves who in turn would reimburse the union for its expenses and make a charitable contribution back to the union of the excess. App., *infra* at 9a.

REASONS FOR GRANTING THE PETITION

This case presents an issue of great concern to unions and other non-profit organizations that represent individuals in litigation against the federal government. Despite the express language and clear legislative history of the Equal Access to Justice Act, which require *all* attorney fee awards, without exception, to be based on prevailing market rates, the court of appeals decision improperly creates a rule that limits fee recovery by non-profit organizations like NTEU to actual cost. The court of appeals' decision is inconsistent with the EAJA, is in square conflict with the decisions of the Ninth Circuit in *Curran* v. *Department of the Treasury*, 805 F.2d 1406 (1986) and the D.C. Circuit in *Jordan* v. *Department of Justice*, 694 F.2d 514 (D.C. Cir. 1982), and plainly misconstrues relevant ethical principles. For all of these reasons, this Court should grant review.

1. The court of appeals' decision is plainly at odds with both the express language and the legislative history of the EAJA. The EAJA specifically provides that "the amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished." 28 U.S.C. 2412(d)(2)(A). The sole enumerated exception to prevailing market rate fees the EAJA permits is to cap fees at $75 per hour, absent special circumstances justifying a higher award. *Id.* The Senate Report accompanying the EAJA is similarly unequivocal in requiring that fees be calculated at market rates:

> In general . . . the computation of attorney fees should be based on prevailing market rates without reference to the fee arrangements between the attor-

> ney and client. The fact that attorneys may be providing services at salaries or hourly rates below the standard commercial rates which attorneys might normally receive for services rendered is not relevant to the computation of compensation under the Act. In short, the award of fees is to be determined according to general professional standards.

S. Rep. No. 253, 96th Cong., 1st Sess. 17 (1979).

In requiring that awards be calculated at prevailing market rates, regardless of the fee arrangement between attorney and client, Congress made explicit in the EAJA the rule that it had implicitly established in other fee shifting statutes. In *Blum* v. *Stenson*, 465 U.S. 886 (1984), this Court unanimously ruled that when Congress used the phrase "reasonable attorney's fees" in a fee shifting statute (there the Civil Rights Attorney Fees Awards Act, 42 U.S.C. 1988) it intended the courts to determine all attorney's fees awards—including those to non-profit organizations employing salaried in-house counsel—with reference to prevailing market rates.

In this case, of course, Congressional intent to award fees at least at market rates, without reference to the actual cost of services, is even clearer than it was in *Blum*, or under other fee shifting statutes. Congress did not merely provide for an award of "reasonable attorney's fees." Under the EAJA, Congress explicitly directed that fees be awarded at prevailing market rates. Thus, the court below clearly disregarded this Court's instruction in *Blum* that the resolution of whether a market rate or cost related standard is applicable "begins and ends with an interpretation of the attorney's fees statute." 465 U.S. at 893.[6]

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[6] The court below stated that "different concerns exist when awarding attorneys fees in civil rights cases where encouraging private attorneys general to come forth and challenge governmental abuses is undeniably an important concern." App., *infra*

Moreover, the unauthorized exception the court of appeals created cannot be rationally limited to labor unions or to fee awards under the EAJA. The obscure ethical "problem" the court unearthed in *Goodrich* and applied here, without any support in the Act's language or history (in fact in direct conflict with the Act), would presumably exist whenever any non-profit organization that employed in-house counsel—like the ACLU, the NAACP Legal Defense Fund, or the Environmental Defense Fund—was entitled to receive attorney's fees, and under any fee shifting statute. Review of the court of appeals' decision is warranted because it is plainly inconsistent with Congressional intent under the EAJA and necessarily threatens the rights of all non-profit organizations to recover market rate fees under a broad range of fee shifting statutes designed to vindicate important national policies.

2. Review is also warranted in this case because the court of appeals' ruling on the ethical issue is in square conflict with the recent decision of the Ninth Circuit in *Curran* v. *Department of Treasury* and the decision of the D.C. Circuit in *Jordan* v. *Department of Justice*.[7] In *Curran*, the Ninth Circuit explicitly repudiated the Federal Circuit's rulings in this case and in *Goodrich*. It held that NTEU was entitled to recover attorney's fees

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at 8a. However, the court neglected to specify what those different concerns are. If NTEU's receipt of market rate fees under the EAJA is unethical, then the receipt of such fees would be equally unethical in a civil rights case. *Blum* is indistinguishable from this case, except to the extent that the language of the EAJA provides even stronger justification for awarding prevailing market rate fees.

[7] In fact, the Federal Circuit's decision in this case in inconsistent with one of its own earlier decisions. In *Devine* v. *Sutermeister*, a case identical to this one, the Federal Court awarded prevailing market rate fees to NTEU under the EAJA. App., *infra* at 7a, n.7.

at market rates (in that case under the Back Pay Act), and that there was no ethical barrier to that recovery, where the fees were placed in a separate litigation account.[8]

In concluding that there was no ethical barrier to an award of market rate fees to NTEU in *Curran*, the Ninth Circuit expressly relied upon the rulings of the D.C. Circuit in *Jordan* and in *NTEU* v. *Department of Treasury*. In the latter case, the court of appeals held that ethical principles concerning the sharing of fees with lay entities and the unauthorized practice of law, prohibited the award of market rate fees in a Privacy Act case successfully litigated by NTEU staff attorneys. The court refused to award NTEU market rate fees because the fees would go "into the union's general treasury." 656 F.2d at 852. Thus, the court reasoned, "the employing lay organization would capitalize on the attorney's services, reap a profit therefrom, and put the monies thus made to any use it chooses." *Id.* at 893. However, the court explained, this ethical problem would not arise in organizations whose fees "are plowed back into the litigation programs that made their recovery possible in the first place." 656 F.2d at 854. Accordingly, the court suggested that for organizations such as NTEU, full fee awards might "withstand criticism when the monies are directed into a fund for the maintenance of a legal services program." 656 F.2d at 855 (footnote omitted).

After this decision, NTEU followed the D.C. Circuit's suggestion and set up the NTEU Legal Services Program, a separate account into which all fees would be

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[8] The Back Pay Act, like most fee shifting statutes, provides for "reasonable attorney's fees," and does not specify prevailing market rates, as does the EAJA. See 5 U.S.C. 5596(b)(1)(A)(ii); 7701(g)(1). The Ninth Circuit ruled nonetheless that "reasonable attorney's fees" has the same meaning under the Back Pay Act as it does under other fee shifting statutes; namely, prevailing market rate. *Curran, supra,* 804 F.2d at 1410.

allocated, to be used solely for funding litigation. The propriety of this practice was confirmed by the D.C. Circuit one year later in *Jordan* v. *Department of Justice*, *supra*. The Federal Circuit's decision in this case is in conflict with the D.C. Circuit's decision in *Jordan*.

In sanctioning an award of market rate fees to the Institute for Public Representation in *Jordan*, the court specifically said that a lay entity such as the Institute, that places its portion of an attorney fee award in a "fund dedicated solely to litigation," would not be engaged in the division of fees prohibited by the ethical considerations discussed in *NTEU* v. *Treasury*. Chief Judge Robinson, author of the opinion for the court in *NTEU*, also wrote the opinion for the court in *Jordan*. He explained that his opinion for the court in *NTEU* had held only "that it is improper for an entity not licensed to practice law to partake in attorneys' fees representing the market formula . . . where its portion is not to be placed in a fund dedicated solely to litigation." 691 F.2d at 516, n.14 (citations omitted).

3. The import of the Federal Circuit's unexplained and contrary ruling in this case is that it is unethical to use attorney fee awards from one case to finance future litigation. NTEU's Legal Services Program is on precisely the same footing as any other legal enterprise in which fees obtained in some cases subsidize legal work in other, similar cases. The Federal Circuit's decision warrants review because the ethical underpinnings of this widespread practice have long been clear, *e.g.*, *Blum* v. *Stenson*, *supra*, and because its prohibition is unjustified by the language or rationale of the fee-splitting rule. In fact, a recent opinion issued by the D.C. Bar, concerning this very issue, concludes that "it is not unethical for union attorneys to receive a market value fee award that is deposited in a legal assistance fund used only by attorneys to provide legal services for members."

D.C. Bar Op. No. 176 (October 21, 1986). App., *infra* at 43a.

The ethical rule at issue here is that a lawyer "shall not share legal fees with a non-lawyer." Rule 5.4(a), American Bar Association Model Rules of Professional Conduct (1983). The purpose of this Rule is "to protect the lawyer's professional independence of judgment," ABA Model Rules of Professional Conduct, Rule 5.4, comment (1983), and to prevent laymen from practicing law, D.C. Bar Opinion 176, at p. 7. As the Ninth Circuit observed in *Curran*, "when fees are paid into a separate account used solely by lawyers for litigation purposes, there simply is no fee splitting with a lay entity and no encouragement of the unauthorized practice of law." *Accord*, D.C. Bar Opinion 176 (October 21, 1986) (App. *infra*, at 47a-48a). Indeed it is precisely the purpose of NTEU's separate account to avoid "sharing" of legal fees. As the Ninth Circuit, the D.C. Circuit, and the D.C. Bar have concluded, a separate account effectively eliminates any ethical problem that could arise when a non-profit organization receives above-cost fees.[9]

In *Goodrich*, the Federal Circuit opined that even if fees were not actually "shared" between attorneys and the general treasury because of the use of a separate account, a fee splitting problem would nonetheless exist

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[9] We note here that both the Ninth Circuit and the D.C. Bar have expressly reserved the question whether even a separate fund is required to avoid "fee splitting." *Curran, supra*, 805 F.2d at 1408 n.1; D.C. Bar Op. 176, at 6-7 & n.4, App., *infra* at 47a & n.4. The Ninth Circuit has observed that

> "the government has never argued that we should treat unions differently than any other lay organization. A requirement that all lay entities, including for-profit corporations using in-house counsel, must establish separate litigation funds before being compensated at market rate is sweeping and appears unprecedented in the arena of ethical standards."

804 F.2d at 1408 n.1.

because the union's treasury would reap an "indirect benefit" by being relieved of the burden of financing future litigation. Both the Ninth Circuit and the D.C. Bar have properly rejected this illogical conclusion. As the *Curran* court explained:

> Although the prospect of indirect benefits through successful litigation might encourage lay organizations to litigate more meritorious cases, they would still necessarily rely on attorneys to conduct the litigation. Moreover, an indirect benefit from an above-cost fee award would accrue to any contributor to a pro bono legal project receiving such an award. This would include contributors to the Legal Aid Society of New York, to which the Supreme Court approved an award of market rate fees in *Blum*, 465 U.S. at 890, 901-02, 104 S. Ct. 1544, 1550.

805 F.2d at 1409-1410.[10]

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[10] We note at this juncture that the Federal Circuit's description of even the *indirect* benefit NTEU could receive if market rates fees were recoverable is overstated. In *Goodrich*, the court concluded that "the amount of its general funds the union is *required* to use to provide legal services" would be reduced if the Legal Services Program recovered above-cost fees. 733 F.2d at 1580 (emphasis added). But NTEU's duty fairly to represent bargaining unit members does not require the union to provide attorneys to individual employees or to represent their collective interests in litigation. There is simply no obligation to be relieved.

Further, the Federal Circuit's suggestion in *Goodrich* and here that a different result might obtain if the legal representation fund fully supported the union's legal program (733 F.2d at 1581), or if staff attorneys merely turned the fees over as a "charitable contribution" underscores the illogic of its "indirect benefit" discussion generally. First, it is difficult to understand how the union would be any less "benefitted" if it were able to rely completely upon the fund to pay the expenses of litigation. If anything, the "benefit" would be greater. And second, requiring the fees to be laundered through the staff attorney clearly elevates form over substance, and does nothing to eliminate any "indirect benefit" the union may reap from an award of above cost fees.

Finally, the total inapplicability of the fee-splitting prohibition to this case is highlighted by the fact that the Federal Circuit's holding is contrary to the results in countless decisions where market fees have been awarded to counsel employed by umbrella lay organizations. In those decisions, as here, the amount of general revenues the organizations would need to use to finance future legal services would be reduced by an award of above cost fees. Yet none of these decisions even mentioned the ethical problem the Federal Circuit discerned in this case, much less used it as a rationale for ignoring express statutory language. *See,* Appendix to D.C. Bar Opinion 176, App., *infra,* at 50a-51a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LOIS G. WILLIAMS *
Director of Litigation

ELAINE KAPLAN
Assistant Counsel for Litigation

NATIONAL TREASURY EMPLOYEES UNION
1730 K Street, N.W., Suite 1100
Washington, D.C. 20006
Counsel for Petitioners

* Counsel of Record

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Appeal No. 83-1409

ON MOTION

DONALD J. DEVINE,[1]
Petitioner,

v.

NATIONAL TREASURY EMPLOYEES UNION,
Respondent.

Before RICH, DAVIS, and BALDWIN, *Circuit Judges.*

ORDER

National Treasury Employees Union (NTEU) applies for attorney fees and expenses in connection with representing employee Zazenza Smith in an adverse action proceeding.[2] Smith ultimately prevailed in this court. Specifically, NTEU seeks attorney fees for responding to the Office of Personnel Management's (OPM) petition for reconsideration of the arbitrator's decision in Smith's case in December 1982 and fees and expenses for defend-

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[1] Donald J. Devine has been replaced by Constance Horner as Director of the Office of Personnel Management.

[2] We presume that NTEU applies for fees on behalf of employee Smith. *Cf. Terrie G. Reid* v. *Dep't of Commerce*, 793 F.2d 277 (Fed. Cir. 1986).

ing the petition by OPM to this court during the period 1983 to 1984. OPM opposes this application.

Fees for Defending the Motion for Reconsideration

On December 17, 1982, OPM moved for reconsideration of the arbitrator's decision mitigating the agency's penalty of removal to an eleven-month suspension, and the arbitrator denied that motion on January 19, 1983. Any recovery due NTEU for representing Smith before the board, in this case an arbitrator in the board's stead, would lie in the Back Pay Act, 5 USC 5596. *Gavette* v. *Office of Personnel Management*, 785 F.2d 1568, 1573 (Fed. Cir. 1986). In order to recover, NTEU must show that Smith was the "prevailing party" and that an award of attorney fees would be "in the interest of justice." 5 USC 5596 (b) (1) (A) (ii) (1982); *Gavette*, supra, at 1573. That Smith was the prevailing party is undisputed, but that an award of fees would be in the interest of justice is, and properly so. We hold that it would not be in the interest of justice to compensate NTEU for its time spent defending Smith before the arbitrator for the following reasons: (1) Smith was removed from a position of independent responsibility and trust for falsifying her time sheets and making false statements to her supervisor about the sheets: (2) the arbitrator sustained all of the charges made by the agency; (3) removal for dishonesty has been upheld by this court's predecessor on a number of occasions; and (4) OPM believed that the arbitrator did not consider all of the relevant factors when determining the penalty. *See Wise* v. *Merit Systems Protection Board*, 780 F.2d 997, 999 (Fed. Cir. 1985); *Young* v. *Merit Systems Protection Board*, 776 F.2d 1027, 1029 (Fed. Cir. 1985). Therefore, we award NTEU nothing in connection with defending the government's motion for reconsideration before the arbitrator.

Fees for Defending the Appeal to This Court

1. *Liability*

OPM petitioned this court for review of the arbitrator's decision on February 23, 1983. This court held that the arbitrator, in a well-reasoned opinion, addressed all the relevant issues and considered the applicable *Douglas* factors. Smith being a prevailing party, NTEU shall recover attorney fees and expenses incurred in defending the government's petition for review to this court under the Equal Access to Justice Act (EAJA) "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 USC 2412(d)(1)(A) (as amended, Pub. L. No. 99-80, 99 Stat. 183; enacted August 5, 1985, 99th Congress, 1st Session); *Gavette*, supra, at 1578. In other words, OPM must show that it "was *clearly* reasonable in asserting its position, including its position at the agency level, in view of the law and the facts." *Id.* at 1579. We do not find that an award would be unjust or that the position of the United States was clearly reasonable for the following reasons: (1) this court, in *Devine* v. *Sutermeister*, 724 F.2d 1558 (Fed. Cir. 1983), stated that "we question whether the issue of the arbitrator's balancing of the factors concerning mitigation is even an issue properly appealed by OPM under 5 U.S.C. § 7703(d)" and the "issue of mitigation is essentially a matter of judgment closely tied to the facts of this case, precisely the type of issue which OPM should not petition for review." *Id.* at 1566. The merits panel of this case reiterated that position. The position of the United States—that the arbitrator improperly mitigated the penalty—was not substantially justified.

2. *Amount of Fees to be Awarded*

NTEU claims that it is entitled to attorney fees at the "prevailing market rate" as prescribed by § 2412(d)(2)(A) of the EAJA and therefore seeks $13,781.25 for de-

fending the appeal to this court: $75/hour for 183.75 hours of work (NTEU's figures were four hours too high, apparently due to errors in addition). Absent a showing of special circumstances such as the limited availability of qualified attorneys for the proceeding involved, which is not the case here, "attorney fees shall not be awarded in excess of $75 per hour." § 2412(d)(2)(A)(ii). NTEU seeks the maximum rate, $75/hour, which is permissible absent a showing of special circumstances.[3]

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[3] The pertinent text of § 2412 is:

> (b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.
>
> * * *
>
> (2) For the purposes of this subsection—
>
> (A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.); * * *.

OPM argues that, with respect to attorney fees, NTEU is entitled to recover only its actual costs for attorneys, i.e., the computed hourly wage, based on salary, of the attorneys who worked on the case, multiplied by the number of hours spent on the case. It argues that to award the union the prevailing market rate times the number of hours worked would give the union a windfall because the union did not expend nearly that amount to defend Smith and would be in violation of the rules of ethics; the award would go into NTEU's general coffers and be used for nonlegal purposes. OPM relies on *Goodrich* v. *Department of the Navy*, 733 F.2d 1578 (Fed. Cir. 1984), and *National Treasury Employees Union* v. *Department of the Treasury*, 656 F.2d 848 (D.C. Cir. 1981), for this latter proposition.

The *Goodrich* case involved an award of attorney fees under 5 USC 7701(g)(1) of the Civil Service Reform Act (CSRA) to an attorney who was employed by the American Federation of Government Employees (AFGE) and who represented a federal employee who was removed from his job, this court holding that the board did not commit legal error in limiting the attorney fees award for services rendered in connection with proceedings before the board to "the expenses the union incurred in providing services." *Goodrich*, supra, at 1581. The statute, 5 USC 7701(g)(1) authorizes the board to "require payment by the agency involved of reasonable attorney fees incurred by an employee" who successfully overturns an agency personnel action if the award would be "in the interest of justice," [4] the same standard as that used in

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[4] The text of § 7701(g)(1) is:

> (g)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board,

the Back Pay Act. *See* 5 USC 5596(b)(A)(ii);[5] *Sims* v. *Department of the Navy*, 711 F.2d 1578, 1579-81 (Fed. Cir. 1983).

The board ordinarily calculates the fee in 7701(g) and Back Pay Act cases by multiplying the lawyer's customary hourly rate by the number of hours expended. Where the lawyer is employed by a union, however, the board limits the fees to the amount the union has expended in providing the services, *i.e.*, the lawyer's salary plus overhead expenses. *O'Donnell* v. *Department of the Interior*, 2 MSPB 604, 611 n.10, 2 MSPR 445. 454 n.10 (1980); *Wells* v. *Schweiker*, 12 MSPB 329, 331-32, 14 MSPR 175, 179 ((1982); *Powell* v. *Department of the Treasury*, 8 MSPB 21, 19 MSPR 174 (1984); *Allen* v. *Department of the Treasury*, 20 MSPR 518 (1984).

The latter three board cases, as well as *Goodrich*, rely upon the thoughtful reasoning in *National Treasury Employees*, *supra*. That case involved the NTEU's quest to recover attorney fees under the Privacy Act, 5 USC 552a (1976)[6] for supplying legal services to a successful plaintiff who belonged to the union's prepaid legal plan.

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administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

[5] The text of 5 USC 5596(A)(ii) is:

(ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, or under chapter 11 of title I of the Foreign Service Act of 1980, shall be awarded in accordance with standards established under section 7701(g) of this title; and * * *.

[6] Under the Privacy Act, "[t]he court may assess reasonable fees in favor of a complainant who has substantially prevailed." 5 USC 552a(g)(3)(B).

The attorneys were salaried employees of the union, and admitted that the fee, if awarded, would go to the union, not to them. The court stated that unless the fees were awarded to the lawyers, and not to the union that paid their salary, fees equal only to the union's costs in representing the plaintiff could be awarded. The court cited ABA Code of Professional Responsibility, Disciplinary Rule (DR) 2-103(D)(4)(a) for the maxim that prepaid legal services plans must be so "organized and operated that no profit is derived by it from the rendition of legal services, by lawyers," and DR's 3-102 and 3-101(A) that attorneys may not split fees with laymen or lay organizations, or enable them to engage in the unauthorized practice of law. *National Treasury Employees*, 656 F.2d at 851-52. Accord *Munsey* v. *Federal Mine Safety & Health Com'n*, 701 F.2d 976 (D.C. Cir. 1983); *Jordan* v. *United States Dept. of Justice*, 691 F.2d 514 (D.C. Cir. 1982).[7]

Nothing in the EAJA or its legislative history indicates that courts should ignore these safeguards, addressed in similar cases above, established by the legal profession to protect the public from irresponsible and incompetent law practice when awarding attorney fees under the EAJA. Although the act specifically contemplates that associations, corporations, and similarly large entities can be prevailing parties, and therefore, *a fortiori*, are eligible to receive fee awards, the Act provides no guidance on the question whether a union, not a prevailing party itself, is eligible to receive prevailing market rate fees for services performed as a legal aid organization. These ethical safeguards provide just as compelling a reason to not award prevailing market rates under the EAJA, where fees "shall" be awarded, as they do under other fee provisions such as the Privacy Act, the Back Pay Act, and the Civil Service Reform Act,

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[7] *But see Devine* v. *Sutermeister*, 724 F.2d 1558 (Fed. Cir. 1983) (court awarded prevailing market rate attorney fees to NTEU apparently without addressing the issues raised in this case).

where reasonable fees "may" be awarded; the fact that fee awards are mandatory in the first and discretionary in the latter is not evidence of a legislative intent preclusive of our interpretation here.

Nor does the fact that the EAJA expressly provides that fee awards shall be based on prevailing market rates, *see supra*, note 1, persuade us that fee awards to unions should not be limited to costs incurred because of the considerations outlined herein. Congress was undoubtedly aware that courts have consistently interpreted "reasonable" fees as the prevailing market rate multiplied by the number of hours expended, *see, e.g., Hensley* v. *Eckerhart*, 461 U.S. 424 (1983), effectively the same standard set out in the EAJA, and have long felt unconstrained to raise or lower that amount depending upon the facts of each case. Furthermore, we do not find compelling Congress' intent that regardless of whether the attorney on the case charges less than the prevailing market rate that that attorney should nonetheless receive the prevailing rate. *See* S. Rep. No. 253, 96th Cong., 1st Sess. 17 (1979). Congress was also concerned, of course, about not overburdening the public fisc, and limited the hourly rate to a maximum of $75 per hour, obviously below the rate charged by a number of law firms.

Different concerns exist when awarding attorney fees in civil rights cases where encouraging private attorneys general to come forth and challenge governmental abuses is undeniably an important concern, *see Blum* v. *Stenson*, 465 U.S. 996, 104 S.Ct. 1541 (1984) (Court held that under the Civil Rights Attorney's Fees Award Act of 1976, 42 USC 1988 (Supp. V 1981), non-profit legal services organizations are entitled to a fee based on prevailing market rates rather than their costs); *see also Newman* v. *Piggie Park Enterprises, Inc.*, 309 U.S. 400 (1968), and more compelling than in adverse action cases such as the one at bar. *Goodrich, supra*, at 1581-82. Fur-

thermore, this case is unlike those involving fee awards to legal aid organizations, like that in *Blum*, where the organization exists solely to provide legal help. Here, to the contrary, legal aid is just a small part of what the NTEU provides.

In *Goodrich*, we left for a later day the question whether awarding market rate fees to the union would be appropriate where its legal representation fund *fully* supported the union's legal services program. *See Goodrich*, *supra*, at 1581. In that regard, we note that such an option was addressed by the board in *Wells* v. *Schweiker*, *supra*. The board in *Wells* stated that even if a separate legal fund were established and that all litigation funds came from that fund, that ethical problems would nonetheless exist because such a plan "would relieve the union *pro tanto* from the burden of financing its litigation activities by allocating funds from general revenues [and would allow] it to profit indirectly from that which it could not do directly." *Wells* v. *Schweiker*, *supra*, at 332; *see also Goodrich*, *supra*, at 1581.

If a union chose not to establish a fund fully supportive of the union's litigation activities, the court could award the prevailing market rate fees directly to the attorneys, and they could, in turn, reimburse the union for its actual expenses or, as they are allowed to do in any case, make a charitable contribution to any organization they see fit. *National Treasury Employees*, *supra*; *Wilderness Society* v. *Morton*, 495 F.2d 1026 (*en banc* 1974), *rev'd on other grounds sub nom. Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975)).

In this case, because there is no indication that the fees awarded will not go to the union or that the union has established a fund fully supportive of the union's litigation activities and because we see no reason to ignore the rules of ethics that the legal profession maintains to ensure its integrity, we hold that NTEU, a non-

profit union whose charter goes beyond providing legal services and thus whose fees would inure to the benefit of a nonlegal organization, is entitled to recover only its costs of litigation—overhead expenses and the cost of its attorneys—before this court. The cost of attorneys to NTEU is to be calculated for each attorney separately by multiplying the hourly rate of the attorney, based upon the attorney's salary, by the number of hours reasonably expended on this case by the attorney. The total time expended by the union defending the appeal to this court is, as NTEU's papers reasonably show, 183.75 hours.

Accordingly,

IT IS ORDERED THAT:

NTEU submit to this court the cost, based on salary, of each attorney listed in Respondent's Motion for Award of Attorney's Fees, and its overhead incurred in connection with this case.

FOR THE COURT

/s/ Giles S. Rich
GILES S. RICH
Circuit Judge

13 Nov. 1986
Date

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 83-1409

DONALD J. DEVINE,
Petitioner,

v.

NATIONAL TREASURY EMPLOYEES UNION,
Respondent.

Before RICH, DAVIS, and BALDWIN, *Circuit Judges.*

ORDER

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

FOR THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

12-9-86
Date

cc: Ms. M. Susan Burnett, DOJ
Mr. Robert M. Tobias

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 83-1409

DONALD J. DEVINE, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT,
Petitioner,

v.

NATIONAL TREASURY EMPLOYEES UNION; and
CLAIR V. DUFF, ARBITRATOR,
Respondents.

[Filed Jan. 20, 1987]

Before RICH and DAVIS, *Circuit Judges*, and *BALDWIN, *Senior Circuit Judge*.

ORDER

On consideration of the respondents' motion for award to attorney's fees, it is

ORDERED that the motion be, and is hereby, granted. Petitioner shall pay respondents the sum of $5,965.12, payment to be made on or before February 20, 1987.

Action on the petitioner's suggestion for hearing in banc is not indicated. *Cabot Corp. v. United States*, 788 F.2d 1539 n.3 (Fed. Cir. 1986).

FOR THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

1/16/87
Date

cc: Lois G. Williams, Esq.

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* Judge Baldwin assumed senior status on November 25, 1986.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 83-1409

DONALD J. DEVINE, Director,
Office of Personnel Management,
Petitioner,

v.

NATIONAL TREASURY EMPLOYEES UNION; and
CLAIR V. DUFF, Arbitrator,
Respondents.

DECIDED: July 2, 1984

Before RICH, DAVIS, and BALDWIN, *Circuit Judges.*

RICH, *Circuit Judge.*

Petitioner, Donald J. Devine, as director of the Office of Personnel Management (OPM), here appeals an arbitral decision, filed November 12, 1982 (adhered to on request for reconsideration January 19, 1983) by Clair V. Duff, Arbitrator (Duff). Duff mitigated the penalty of removal originally imposed upon Ms. Zazenda Smith (Smith) by the Internal Revenue Service (IRS or agency) to an 11-month suspension. We affirm.

Smith was for seven years a tax auditor of the IRS, moving up in grade from GS-4 to GS-9. Her duties included the examination and auditing of complete tax returns. She was removed from the service because of an administrative investigation which concluded that Smith had falsified documents to enhance her performance rec-

ord as a GS-9 auditor, and had made false verbal statements to her supervisor on May 27, 1981. Smith took her removal to arbitration pursuant to the terms of the collective bargaining agreement between the National Treasury Employees Union and the IRS.

Duff found Smith guilty of the charge and also found a nexus between this type of conduct and the efficiency of the service. Duff, in assessing the agency's choice of penalty, expressly applied the standards set forth by the Merit Systems Protection Board (MSPB) in *Douglas* v. *Veterans Administration*, 5 MSPB 313 (1981). *Douglas* lists 12 factors "that are relevant for consideration in determining the appropriateness of a penalty." 5 MSPB at 331. Duff mitigated Smith's removal to the lesser penalty of an 11-month suspension without pay.

Election to review this case is *discretionary* with this court pursuant to 5 USC 7703(d), which allows for review "in 'exceptional' cases where the MSPB or arbitrator erred in its application of civil service law *and* the decision will have a substantial impact on civil service law." *Devine* v. *Sutermeister*, 724 F.2d 1558, 1566 (Fed. Cir. 1983).

Devine contends that Duff "misapplied the *Douglas* standards in substituting his own judgment in regard to the choice of an appropriate penalty for that of the agency," discussing *Douglas* saying:

> Under the *Douglas* standards, an arbitrator who has found the charges supported by a preponderance of the evidence and has found a nexus between the charges and the efficiency of the service, may mitigate the penalty selected by the agency only when such penalty is arbitrary, capricious, an abuse of discretion, not in accordance with law, unsupported by substantial evidence or unreasonable.

Devine continues, saying:

> To the extent that [*Sutermeister*] . . . modified or changed the role of an arbitrator from that exercised by the MSPB in his or her relationship to the review of the agency's discretionary power to select a penalty, the decision was in error.

We disagree with Devine's contentions that certain portions of *Sutermeister* are in error. Section III of the opinion in *Sutermeister*, 724 F.2d at 1564-66, squarely addressed the contention that "an arbitrator i[s] bound to the precedents of the MSPB," and found that "position to be unsupported. . . ." 724 F.2d at 1565. This court went on to say:

> Whether the MSBP *might have* reached a contrary conclusion is simply not relevant to our review of the arbitrator's award, which was rendered pursuant to authority given him by agreement of the parties to the arbitration and pursuant to law. [Emphasis ours.]

Duff, in a well reasoned opinion, addressed all the issues relating to Smith's removal, and considered the individual *Douglas* factors which he found applicable. The possibility that the MSPB might have reached a different result is insufficient to show that Duff abused his discretion in mitigating Smith's penalty.

While not in itself dispositive, we note the procedural history of this case. On October 5, 1983, a motions panel of this court denied respondent's motion to dismiss the petition on the grounds of non-prosecution, untimeliness, and lack of sufficient basis for statutory review. That decision is important when, as in this case, our review of the case is *discretionary* under 5 USC 7703(d), which allows for review "in 'exceptional' cases where the MSPB or arbitrator erred in its application of civil service law *and* the decision will have a substantial impact on civil

service law." *Sutermeister*, 724 F.2d at 1566. *Sutermeister* was decided December 14, 1983, and both parties have extensively addressed its applicability to the present appeal. Accordingly, we address the propriety of this appeal in light of *Sutermeister*. Our authority to review the award of an arbitrator derives from 5 USC 7121(f).

In *Sutermeister*, the OPM appealed an arbitral award reinstating Richard Walton as a Customs Entry Aide, after he had been removed for falsifying his employment application. This court, in addressing the question whether an arbitrator's balancing of the factors concerning mitigation can ever be appealable under 5 USC 7703 (d) stated:

> [M]itigation is essentially a matter of judgment closely tied to the facts of this case, precisely the type of issue which OPM should not petition for review. It would frustrate the purpose of the limited, discretionary appeal provision of section 7703 (d) [5 USC] for OPM to request that this court decide issues that clearly will not have a substantial impact on civil service law.

We hold that Devine has failed to show in this case how Duff's award is "exceptional" within the meaning of *Sutermeister*. We are not convinced that to allow the decision to stand will have a substantial impact on civil service law. 724 F.2d at 1566. Had this appeal been filed post-*Sutermeister*, our decision to entertain jurisdiction to review the case should have been denied.

Accordingly, since jurisdiction has already been granted by denial of the motion to dismiss, the merits have been adjudicated and Duff's award mitigating Smith's penalty from removal to an 11-month suspension is *affirmed*.

AFFIRMED

IN THE MATTER OF ARBITRATION BETWEEN:

INTERNAL REVENUE SERVICE
BALTIMORE DISTRICT OFFICE

and

NATIONAL TREASURY EMPLOYEES UNION

AWARD AND OPINION

File Number	CC: MA-GLS-84-82
Date of Award	November 12, 1982
Arbitrator	Clair V. Duff
Hearing Date	June 24, 1982
Appearances	For Internal Revenue Service Stephen S. Ash, Esq. For NTEU Mary W. Haller, Esq.
Grievant	Zazenda Smith
Interrogatories and Answers Filed	September 9, 1982
Post-Hearing Briefs Filed	October 29, 1982

OPINION

Grievant, Zazenda Smith, born March 2, 1954, was hired December 23, 1974 by the Internal Revenue Service (IRS or Agency) as a Tax Auditor, GS-4. She worked at the Baltimore District Office, at all times here relevant, and advanced by several promotions to the position of Tax Auditor, GS-9 on June 24, 1979. A person classified as Tax Auditor (GS-9) in the Examination Division is required to examine tax returns, mainly of

corporations and other business units and determine the correct tax liability, evaluate deductions and contributions and make independent judgments on the various tax issues involved.

An Auditor's daily work activities are not subject to constant direct managerial supervision. The Agency requires Tax Auditors to keep an accurate account of all work duties performed and on a daily basis, to record the details of all activities by notations on two forms. First, a Daily Activity Record (DAR) Form 4606 must be executed. It requires the last name of the taxpayer, the tax year, and time expended on 12 or more activities designated by codes. The Auditor also must record the total time spent on each activity, the total examination time and non-examination time, which should specifically account for the total hours worked each day. On Form 4606 the file workload is tabulated by noting the number of files on hand at the start of the day, those received during the day, those forwarded to other locations and those on hand at the close of the day. All actions taken must also be recorded on Form 4607 which is the folder which is designed to contain the tax return. It has appropriate columns for the taxpayer's name, the examiner's initials, all actions taken and similar information.

An Auditor's supervisor, by reviewing the activity information on DAR 4606 and the notations on Form 4607 can quickly determine the useful activity performed by an Auditor during any particular work day. There are numerous other forms prepared on a monthly, or other periodic basis, which are not directly involved in this case. After the tax return has been processed by an Auditor, it is returned to the file packet and an appropriate notation must be made on the 4607 and the same activity recorded on DAR 4606, and the tax return enclosed in the 4607 folder is then returned to Central Files, the Machine Room or some other appropriate work station for further processing. Supervisors make periodic spot

checks of DAR, Form 4606 and compare them with the supporting information on Form 4607, and thus have control of the activities of the employees under their supervision without constantly monitoring them on an hour-by-hour basis.

What triggered the present controversy was a random check of the Grievant's daily work performance. Group Manager James O'Brien, who had been the first line superviser of Mrs. Smith since October, 1980, requested the Grievant on May 27, 1981, to explain the entries on the DAR 4606 she submitted for the prior day's work (May 26, 1981). The 4606 listed work activity on five different tax returns, identified only by taxpayer's last names, and times recorded indicated eight hours devoted to direct examination of these cases. Mr. O'Brien requested that she obtain the five 4607 jackets and the tax returns enclosed therein. She produced two 4607 jackets containing returns for two of the names, but for Jones, Black and Williams, she was unable to produce either the returns or 4607, each of which should have had entries which would substantiate the work claimed on DAR Form 4606. Mrs. Smith testified that she then found a William Martin case and so there would be a consistency between the 4606 time sheet and the 4607 jacket, she then made the required entries. The Form 4606 for May 26th had no Martin as the last name of a taxpayer, whose return was examined that day. The testimony of Group Manager O'Brien and the Grievant differ as to the explanation given by Mrs. Smith, concerning the absence of the 4607 files requested with their enclosed tax returns, from the Central Files or any other place where they would be normally found if they had been worked on by an Auditor during the previous day. Mr. O'Brien pressed for an answer concerning the files that had mysteriously disappeared. Her testimony at the Arbitration Hearing was: "I had made a mental association of what I had done the day before and that's what I put on the time

sheet". (Rec. p. 179) She later explained (Rec. p. 180) ". . . the cases may not have existed but as far as I knew, those were the cases that I had worked."

Group Manager O'Brien, on April 29, 1981, less than a month previously, on the periodic evaluation form called "Report of Managerial Potential", had given Mrs. Smith very good ratings. Donald N. Jones, his immediate superior, also had concurred in the above average ratings. Mr. O'Brien promptly reported to Mr. Jones after the May 27, 1981 conference with Mrs. Smith and revealed the absence of the specific 4607 jackets and tax returns necessary to support Mrs. Smith's DAR 4606 for May 26th. After discussion, it was decided to institute an investigation to determine whether the absence of the 4607 files to support the DAR 4606's executed by Mrs. Smith was an isolated instance involving only May 26th or whether there were similar instances of "lost" records in the recent past. A lengthy and detailed examination was conducted to verify the accuracy of the 4606 Forms executed by Mrs. Smith from May 26, 1981 back to October, 1980. This survey was completed in August, 1981. While the investigation was in progress, Mr. O'Brien examined Mrs. Smith's DAR 4606 Forms on a 100% daily basis and checked to determine whether the information they contained matched notations on the 4607 jackets on all cases worked by Mrs. Smith. While the 100% daily review of Mrs. Smith's work was made by Group Manager O'Brien, there was no mysterious disappearance of any 4607 jackets she claimed to work on.

One important result of the investigation was that it disclosed the repetition of a number of common name entries on 4606 Forms executed by Mrs. Smith for which no 4607 jackets ever were found. Three of these were Jones, Black and Williams, whose absent 4607 jackets for May 26, 1981 launched the detailed inquiry. The completed search revealed the following:

COMMON NAME ENTRIES
ON FORM 4606

Common Name	No. of 4606 Entries Made by Grievant	Time Recorded
Black	6	5.7 hrs.
Brown	10	9.1 hrs.
Carson	5	5.1 hrs.
Cross	4	5.0 hrs.
Clark	7	7.6 hrs.
Cook	3	2.9 hrs.
Johnson	17	18.7 hrs.
Jones	18	16.1 hrs.
Lawrence	4	3.9 hrs.
Nelson	14	10.2 hrs.
Oates	1	2.0 hrs.
Thomas	8	8.8 hrs.
Williams	14	12.6 hrs.
Thompson	7	8.5 hrs.
Wilson	18	14.7 hrs.
	136	130.9 hrs.

By letter dated October 13, 1981, Bobby R. Blinton, Chief, Examination Division, Baltimore District, IRS, informed Mrs. Zazenda Smith of proposed adverse action in accordance with Part 752 of the Office of Personnel Management Regulations. The proposed action was based upon an allegation that evidence proved that Mrs. Smith made false verbal statements to her supervisor on May 27, 1981, concerning time spent on non-existent tax returns which the Agency believed involved fictitious taxpayers. It also charged that Mrs. Smith had made false statements on official documents, SF 4606, Daily Activity Records, which showed time spent on activities involving 15 taxpayers who were non-existent. It alleged a violation of § 225.5, False Statements of the Handbook of Employees Responsibilities and Conduct (IRM 0735.1).

On October 16, 1981, a within grade pay increase was given to Mrs. Smith and her supervisor certified that

she then was performing all aspects of her job classification at a satisfactory level. The proposed adverse action was protested by the Grievant. On October 30, 1981, an Oral Reply Proceedings was held with B. R. Blinton, serving as Chairman. The Agency's position remained unchanged and the matter referred to the District Director for appropriate action.

By letter of January 4, 1982, Mr. Teddy R. Kern, District Director of the Baltimore District, stated that after reviewing the evidence and documents and prior procedural hearings, determined that the specifications warranted Grievant's removal from the Agency to promote the efficiency of the Service. The termination decision was made effective January 8, 1982 and that was the last day of the Grievant's employment for the Agency. The Union promptly protested and when the Parties failed to attain an amicable settlement of the dispute, ultimately the present Arbitration resulted.

ISSUES

§ 1. Has the Employer proved by a preponderance of the evidence that the Grievant, Zazenda Smith, is guilty of the offenses charged?

§ 2. Has the Agency established a reasonable nexus between any improper conduct by the Grievant and the efficiency of the Service?

§ 3. Was removal of the Grievant from the Service a reasonably appropriate penalty, within managerial discretion, or was it too severe for the offenses committed?

ISSUE NO. 1

Proof of Offense

Article 34 of the National Agreement specifies in considerable detail the rules which must be followed when the Agency takes any adverse action against an employee.

Section 5, C provides: "The burden of proof in any arbitration over this matter will be the preponderance of evidence". We agree with the definition of "preponderance of evidence" as set forth in the Union Post-Hearing Brief. It is: "that degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter as asserted is more likely to be true than not true,". This is a high standard of proof and although not as exacting as the requirement of "proof beyond a reasonable doubt" which is used in Criminal Courts, it places on the Employer a heavy burden of persuasion. Your Arbitrator has been mindful of this evidentiary standard in his evaluation of the testimony and other evidence.

We have evaluated the extensive evidence very carefully and we have reached the conclusion that the Agency has definitely proved that the Grievant is guilty as charged. The pattern of improper conduct is clear. The Grievant created phantom taxpayers, mostly selecting common names, and entered them on numerous 4606 Forms. At least 136 unsubstantiated entries claimed 130.9 hours of work on tax returns. These recorded figures were fabricated by the Grievant during the period from October, 1980 to May, 1981. The Union assertion that investigators from the Baltimore Office should have made inquiry at the Philadelphia Regional facility, where completed files are sent from Baltimore, constitutes imaginative advocacy but is not at all persuasive. Mrs. Smith had an opportunity on May 27, 1981 to produce files which she claimed to have processed on May 26 and certainly these "missing" files for Jones, Black and Williams could not all have been sent from Baltimore to Philadelphia in that 24 hour period. It is interesting to note that these three common names were used for 38 entries on Grievant's DAR 4606 Forms over the time period covered by this investigation.

It would serve no useful purpose to repeat all other evidence presented. However, we do feel obligated to comment that the credibility of Zazenda Smith, when she testfied at the Arbitration Hearing, contributed nothing to her defense. Her explanation for the common names that she recorded was that she "made a mental association of what she had done the day before and that's what I put on the time sheet" does not explain the obvious use of phantom names, nor does her claim of being so busy that she could not record the taxpayers accurately. This is not a case involving negligence or inadequate record keeping but one that is based on an intentional scheme to pad her work activity report. Her motive is self-evident. Instead of indicating that she was an average competent worker, she desired to appear superior in the quantity of daily work performed. The Agency did not sustain a direct financial loss and no taxpayer benefited by her improper activities. The dishonest gain she obtained was that it enhanced her competitive status which is important to any civil servant who is rated periodically and who depends in no small degree upon his or her work performance record for promotional opportunities, job retention and similar employee benefits while employed by the Agency.

ISSUE NO. 2

Nexus Between Grounds For Adverse Action and Efficiency of the Service

To sustain an adverse action against an employee, the Agency must not only prove that the employee is guilty of some misconduct but that disciplinary action is necessary to promote the efficiency of the Service. There must be a definite connection between the offense and the work duties and responsibilities of the employee. Mrs. Zazenda Smith, in her capacity as a Tax Auditor, GS-9, in the Examination Branch of the Baltimore District Office, was responsible for numerous activities which were not under

the close day-to-day, hour-by-hour supervision of any supervisor. The Handbook of Employee Conduct and Responsibilities in § 335.3 clearly states that the functioning of the Service requires that personnel of other governmental agencies and the general public must be able to rely implicitly on the truthfulness of IRS employees in matters of official interest. The Handbook clearly warns employees that they will be subject to severe disciplinary penalties and possible prosecution for intentionally making false or misleading verbal or written statements concerning official matters. Work reports of any nature or accounts of any kind are included in this requirement for truth and reliability. The invention of fictitious taxpayers, in order to pad an Auditor's daily inventory of work performed, discloses a manifest intent to fallaciously claim greater activity in the daily work performed and thus more efficiency than in fact the Grievant possessed. The purpose of the 4606 and 4607 Forms is to enable the Branch Manager and other management officials to supervise by an analysis of the records, because it is impossible to monitor the activities of Auditors on an hour-to-hour basis. The supervisor should be able to make an informed judgment concerning whether employees under his jurisdiction are functioning efficiently based on the records executed by the Auditors. The padding of work activity figures constitutes an attempt to deceive the supervisor and the efficiency of an employee or group could deteriorate without the responsible Group Manager being cognizant of that decline because his judgment would be predicated on records that are fabrications. The gravamen of the offense committed by Mrs. Smith is that her dishonesty deceived her supervisors in essential efficiency measuring procedures and thus inhibit the efficiency of the Service. The IRS has the right to expect total honesty from its employees and particularly from someone who has advanced to the important position of Tax Auditor, GS-9, where the incumbent is responsible for independent judgment on crucial tax questions and

not merely routine clerical performance. The public is entitled to Auditors whose fairness and honesty is beyond question to make the difficult decisions inherent in an Auditor's position. Falsification of reports reveals a lack of veracity and trustworthiness. This case does not involve neglect or incompetence by an employee but a deviation from the normal ethical standards required of an employee in this position. We find as a fact that a firm nexus exists between the dishonest acts committed by Mrs. Smith and her work duties as a Tax Auditor. There are many cases where employees have been found guilty of improper conduct that have no reasonable link with his or her assigned work duties at the employing Agency. In such cases, disciplinary action may not be necessary in order to promote the efficiency of the Service. However, in this case a close relationship exists between the dishonesty proven and the usefulness of the Grievant in the Service. Either she must reform or removal is justified to prevent interference with the efficiency of the Service.

ISSUE NO. 3

Severity of Penalty

Basic justice requires that there always must be a reasonable proportionality between the offense committed and the severity of the penalty imposed. The Union argues that the disciplinary action of removal from the Service is unduly harsh and constitutes an abuse of Agency discretion. This contention deserves very careful analysis and thoughtful consideration. The case of *Curtis Douglas et al. v. Veterans Administration, et al.* (Douglas) MSPB Docket No. AT075299006 (1981) enunciated certain basic principles which are apposite here. It stated that a fundamental requirement is that agencies must exercise responsible judgment in each case which is based on specific, individual considerations, rather than acting automatically on the basis of a generalization un-

related to the individual situation. That Opinion also states that OPM has specifically counseled agencies that:

> Any disciplinary action demands the exercise of responsible judgment so that an employee will not be penalized out of proportion to the character of the offense; this is particularly true of an employee who has a previous record of completely satisfactory service. An adverse action, such as suspension, should be ordered only after a responsible determination that a less severe penalty, such as admonition or reprimand, is inadequate.

In that Opinion the Board further stated:

> Court decisions and OPM and Civil Service Commission issuances have recognized a number of factors that are relevant for consideration in determining the appropriateness of a penalty. Without purporting to be exhaustive, those generally recognized as relevant include the following:
>
> (1) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
>
> (2) the employee's job level and type of employment including supervisory or fiduciary role, contacts with the public, and prominence of the position;
>
> (3) the employee's past disciplinary record;
>
> (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers and dependability;
>
> (5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;

(6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;

(7) consistency of the penalty with any applicable agency table of penalties;

(8) the notoriety of the offense or its impact upon the reputation of the agency;

(9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or has been warned about the conduct in question;

(10) potential for the employee's rehabilitation;

(11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter, and

(12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Not all of these factors will be pertinent in every case, and frequently in the individual case some of the pertinent factors will weigh in the appellant's favor while others may not or may even constitute aggravating circumstances. Selection of an appropriate penalty must thus involve a responsible balancing of the relevant factors in the individual case. . . .

That Decision further provides that:

The appropriateness of a particular penalty is a separate and distinct question from that of whether there is an adequate relationship of "nexus" between the grounds for adverse action and "the efficiency of the service." . . .

We must apply these basic rules to the facts of the instant case.

Mrs. Smith, now 28 years, completed more than 7 years of satisfactory service with the Agency and no disciplinary action ever was taken against her, prior to the present case. By any fair test, she has been a better than average employee and has been awarded periodic promotions and salary advancements. She completed a Bachelor of Science Degree in Accounting at Morgan State University since being employed by the I.R.S. Of the twelve rules listed in *Douglas* to determine the appropriateness of a disciplinary penalty, several are particularly apposite to this present case. Rule (3) is the employee's past disciplinary record—Grievant's past record is without blemish. Rule (5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisor's confidence in the employee's ability to perform assigned duties—this guideline has been given special consideration.

The letter of proposed adverse action sent to Grievant by the Agency was dated October 13, 1981 but despite this fact, three days later, on October 16, 1981, Mrs. Smith received a within-grade salary increase. This increase in compensation was predicated upon a certification by Grievant's Group Manager that she was then performing in all aspects of her position at a satisfactory level. The investigation of Grievant's activities had been completed weeks prior and sufficient time existed to institute administrative action to prevent this salary increase if her supervisor truly lacked confidence in Grievant's work performance.

In Interrogatories submitted by the Union to Mr. Teddy Kern, Director of the Baltimore District, he was asked "Please state specifically, all factors you considered before you decided to remove Mrs. Smith." His response in part was: ". . . The evidence uncovered by

Mrs. Smith's supervisor, . . . indicated to us that Ms. Smith had displayed a distinct lack of veracity and innate integrity that we expect of all IRS employee, thus destroying any confidence her manager and the IRS could have had in her performing those duties satisfactorily without constant, close supervision." The question of whether Grievant had destroyed the confidence the Manager had in her, deserves careful evaluation. Group Manager O'Brien, during the final four months of the Grievant's employment at the Agency, discontinued his former 100% review of Forms 4606 and 4607 submitted by the Grievant. At the Hearing, he was asked why he told Grievant that he was not reviewing all her daily activity records anymore. Mr. O'Brien responded that the first reason he had done so was because of the limitations on his available time but secondly "because I was trying to reestablish with her, trust in her work. In other words, she was still my employee and I was still responsible for treating her as an employee regardless of whatever pending action may or not have been taken". (Tr. 131, 132) A review of the entire testimony of Mr. O'Brien indicates that despite the fact that the investigation he had directed disclosed that the Grievant had been caught cheating by padding her work activity records, he had cautiously re-established confidence and trust in her during the last three or four months of her employment with the Agency. Mr. O'Brien was a fair and reasonable supervisor who was in a good position to observe the Grievant and her work. It appears probable that District Director Kern was mistaken in concluding that the Grievant's offenses destroyed all confidence her Manager could have in Grievant performing her work duties satisfactorily. The record discloses that despite the dishonest scheme which was uncovered, Grievant, for many years, was a good worker and her demonstrated competence led supervisors to assign her to assist other Auditors on complex cases.

Rule (10) listed in *Douglas* weighs the potential for the employees rehabilitation. We are persuaded that the Agency failed to give sufficient weight to this factor under the circumstances of the present case. In our judgment, her rehabilitation had already started and Group Manager O'Brien became sufficiently confident of the restoration of her veracity that he did discontinue the 100% daily review of her work activity records. It appears probable that Grievant's reform can be continued without any excessive amount of direct supervision. This employee has a past record without blemish and despite being caught cheating in an effect to embellish her record, she had demonstrated talent and ability. We are persuaded that she deserves a chance to achieve rehabilitation as an employee, after receiving adequate punishment.

Rule (12) *Douglas* speaks of the adequacy and effectiveness of alternate sanctions to deter similar improper conduct in the future by this employee or others. We have concluded that the Grievant, having been caught and adequately punished, can be restored to the work force. We are mindful of the necessity for the Agency to convince other employees who may be similarly tempted that honesty is the best policy. We find no reason disclosed by the evidence that removal from the Service is the only penalty that could serve as an adequate deterrent. The I.R.S. has faced similar problems before. In re *Pierno*, MT 0711.65-2 (Arbitration 15-76) cited by the Agency, a Revenue Agent GS-13 assigned to the Pittsburgh Examination Division, prepared examination documents which were not genuine and made false notations on other documents to make it appear to his supervisor that the cases were expeditiously processed to conclusion. In an arbitration decision dated July 17, 1976, the Arbitrator held that although the public did not know of the Agent's transgression, there was a chance that the taxpayers whose records had been improperly altered,

later could have learned of the fabrications. That Opinion stated that such conduct was too serious to go unpunished because it would effectively reduce the ability of the Service to maintain high standards of efficiency and employee conduct. While the fact situations are not identical, they both involve falsely executed paper work. Only a ten day suspension initially was imposed by the Agency and even that adverse action was reduced by the Arbitrator to a written reprimand. We are not suggesting that falsification must be condoned by the Agency but *Pierno* reveals that no iron-clad rule is enforced by I.R.S. that termination must always be imposed for this offense.

Our Award will modify the dismissal and reinstate the Grievant but it will impose upon her a suspension of eleven calendar months without pay. This adverse action is a sufficient penalty to achieve not only the reform of the Grievant but to serve as a deterrent to other employees from similar improper activities.

AWARD

The removal of Zazenda Smith on January 8, 1982 is hereby reversed and converted into a suspension without pay of eleven (11) calendar months. The Agency is directed to reinstate Mrs. Smith on December 8, 1982, but it shall have no obligation to reimburse her for salary or any other contractual benefits lost during the disciplinary suspension.

/s/ Clair V. Duff
CLAIR V. DUFF
Arbitrator

November 12, 1982
Pittsburgh, Pennsylvania

IN THE MATTER OF ARBITRATION BETWEEN:

INTERNAL REVENUE SERVICE
BALTIMORE DISTRICT OFFICE

and

NATIONAL TREASURY EMPLOYEES UNION

DECISION OF PETITION BY OFFICE OF PERSONNEL MANAGEMENT FOR RECONSIDERATION AND STAY OF ARBITRATION AWARD

File Number	CC: MA-GLS-84-82
Date of Original Award	November 12, 1982
Arbitrator	Clair V. Duff
Petition Received by Arbitrator	December 23, 1982
Brief In Opposition To Petition Received From Union	January 10, 1983
Date Of This Answer	January 19, 1983
Appearances on Petition	On Behalf of the United States Office of Personnel Management: Joseph A. Morris General Counsel Stuart M. Foss Assistant General Counsel Steven E. Abow, Attorney

Appearances on Brief in Opposition

On Behalf of the National Treasury Union:

James R. Lawrence
Associate General Counsel

Mary W. Haller
Assistant Counsel

OPINION

On November 12, 1982, Clair V. Duff, the undersigned Arbitrator executed the following Award:

> *The removal of Zazenda Smith on January 8, 1982 is hereby reversed and converted into a suspension without pay of eleven (11) calendar months. The Agency is directed to reinstate Mrs. Smith on December 8, 1982, but it shall have no obligation to reimburse her for salary or any other contractual benefits lost during the disciplinary suspension.*

The Award was signed on Friday, November 12, 1982 and the records of the Arbitrator's office prove that copies of the decision were placed in the United States Mail on Monday, November 15, 1982, for transmittal to the parties. It must be presumed that the decision was received by the IRS and the Union within a few days. The Union's Brief asserts that on December 1, 1982, Counsel for the Grievant was notified by Stephen R. Savold, Chief, Personnel Branch, Baltimore District IRS, that despite the Award, Ms. Smith would not be returned to duty on December 8, 1982. On December 8th, Counsel for Grievant, contacted the IRS Chief of Labor Relations, Calvin Everhart, advising him that Grievant was ready, willing and able to return to duty on that date, pursuant to the terms of the Award. Union Counsel again was informed that Ms. Smith would not be reinstated.

The present Petition submitted on behalf of the United States Office of Personnel Management (OPM) was received at the Office of the Arbitrator on December 23, 1982 and it contains a certification that copies had been served on Union Counsel and IRS on December 17, 1982. A Union's Brief in Opposition to OPM's Petition for Reconsideration and Stay of the Arbitration Award, was received by the Arbitrator on January 12, 1983. The issue is now ready for decision.

DISCUSSION AND FINDINGS

Procedural Issues

The Urion asserts that OPM has failed to present adequate grounds to warrant reconsideration and reversal of the November 12, 1982 Award, and that OPM has failed to show that a Stay is appropriate in the instant case. It requests the Arbitrator to deny OPM's Petition for Reconsideration and Stay and to affirm his initial Award and to order the Agency to comply immediately with the November 12, 1982 Award. It also requests the Arbitrator to award back pay to the Grievant, from December 8th to the date of reinstatement, and to grant attorneys fees to Grievant's legal counsel. Each of these matters require discussion.

The first argument presented by the Union is that the Arbitrator has no authority to reconsider the Award because Article 37, of the applicable Collective Bargaining Agreement, provides that an Arbitrator's decision shall be final and binding. The Petition states that an arbitration award is judicially reviewable under the same conditions as if the matter in dispute had been decided by the Merit Systems Protection Board (MSPB) and thus the Director of OPM may obtain review of the Arbitrator's Award in the United States Court of Appeals for the Federal Circuit. The OPM Petition also states that in cases like the present one, where OPM has not intervened before the Arbitrator, the Director of OPM

first must petition the Arbitrator for reconsideration of the Award before an appeal to Court is proper. We conclude that the Petition correctly states the relevant Federal Law and administrative requirements which constitute a legislative exception to the finality of Award intended as the general rule under Article 37 of the Collective Bargaining Agreement.

The second Union argument is that even assuming that the Arbitrator has appropriate power, authority and jurisdiction to act on the present Petition for Reconsideration, OPM has waived its right to file the within Petition. The Union asserts that both 5 U.S.C. § 7703 and the legislative history concerning judicial review, indicate that the OPM was obligated to file any such Petition within 30 days after the effective date of an arbitration award, the same as if the decision would have been issued by the Board. A study of the Union's arguments, together with the attached evidence of legislative history, *Senate Report, (Government Affairs Committee) No. 95-969,* July 10, 1978 (to accompany S. 2640) persuades this Arbitrator that this Union argument is correct. The main reason that Federal Law requires OPM to first Petition the Arbitrator for Reconsideration prior to seeking judicial review, is to avoid any unnecessary appeal which inevitably delays final resolution of the dispute. A Petition for Reconsideration grants the Board, or an Arbitrator, an opportunity to weigh and consider the concerns of OPM before litigation is instituted. The Union argues that the Director, like any other Petitioner, is required to seek review within 30 days of the decision of the Board and it insists that, precisely for the same reasons, a similar Petition submitted to an Arbitrator must comply with the same 30 day time limit. The final decision of this intricate procedural question will ultimately be made by the appropriate Court but this Arbitrator is persuaded that the procedure time limit of 30 days is apposite and thus the OPM's action was not timely and should be dismissed.

Even assuming *arguendo* that the disputed 30 day time limit is not binding on the Director when he seeks review of an Arbitration Award, we are persuaded that the unique factual circumstances present in this case, constitute undue delay and that this Petition is not entitled to be adjudicated on its substantive merits. This Award was in force either on November 12, 1982, or at latest on November 15th, when it was irretrievably deposited in the United States Mail Service. In selecting the specific date when reinstatement of Grievant would become effective, the Arbitrator was mindful of the time which would be necessary if the Agency decided to challenge the Award. To accommodate this reality, instead of directing that Grievant's reinstatement should be made immediately, the Arbitrator designated December 8th for reinstatement to provide the Agency with a reasonable time to take any appellate action it deemed appropriate *prior* to that date. The IRS Baltimore District Office must be presumed to have received the Award on November 17, 1982 and the Petition (on the face sheet) records that OPM received the Award on November 29, 1982. On December 1, 1982, Counsel for Grievant, was notified by Stephen R. Savold, Chief, Personnel Branch, Baltimore District IRS, that Grievant would not be returned to duty on December 8, 1982. This communication reveals that the IRS or the OPM, on or before that date, had made a final decision to challenge the Award. Both IRS and OPM had sufficient time prior to December 8th, the effective date of the reinstatement order, to institute a Petition or any other legal action. No such Petition was received by the Arbitrator until December 23, 1982. We find as a fact that OPM's Petition is fatally defective because it was not filed within a reasonable time as required by basic justice. However, in order to prevent any further delay with the inevitable, unfavorable impact on the Grievant, we will assume *arguendo* that this Petition is valid and properly may be acted upon by the Arbitrator on its basic merits.

SUBSTANTIVE ISSUES

The OPM Petition states that there are two questions involved:

1. Whether or not the arbitrator properly applied the mitigation standards of *Douglas* in this case when he reduced the Grievant's removal of penalty to an 11-month suspension?

2. Whether the arbitrator violated Federal law and regulation by using the fact that the Agency granted the Grievant a within-grade increase as support for his decision to mitigate?

The first question (set forth above) tacitly implies that this Arbitration Award was drafted as an instrument intended only to apply the specific criteria listed in *Douglas*. The Arbitrator pursued a different goal and formulated his decision of the dispute concerning Grievant's dismissal based on the terms of the apposite Collective Bargaining Agreement and fully aware of his obligation to have the Award draw its essence from that Agreement. The introductory comment in *Douglas* contains a prudent caveat: "In considering whether the agency's judgment was reasonably exercised, it must be borne in mind that the relevant factors are not to be evaluated mechanically by any preordained formula". The guideposts set forth in *Douglas* were not intended as an exhaustive list of rules but were drafted to provide guidance to the Agency and also to any arbitrator. The Arbitrator's decision as to the application of a specific rule to a particular fact situation cannot be successfully challenged merely by a Petition, which indicates that the OPM does not agree with his value judgment.

One factor, among many others, to which the Arbitrator gave due consideration, was that Group Manager O'Brien, who was Grievant's direct supervisor, and thus in an excellent vantage point to make personal on-the-spot evaluations of Grievant's conduct, tried to regain

confidence and "to establish with her, trust in her work". On page 10 of the Award, we specifically quoted *Douglas* Rule 5 and that quotation is correct. The term "supervisors' confidence" as used in Rule 5 does not indicate monolithic judgment of a group but the individual mental attitude of each person in that group. On page 12, Rule 5 is *not being quoted* by the Arbitrator but is being applied to the testimony of *one* Supervisor, Mr. O'Brien. The OPM Petition (p. 8) in an effort to disparage the Arbitrator's reasoning, resorts to a misrepresentation of fact by inserting a false accusation that the Arbitrator has "misquoted it in such a way as to distort its meaning". There can be no misquoting of language that is not being quoted. Manager O'Brien's opinion is not necessarily binding on higher echelons of Management, but we did not state or imply that it was. The uncontested fact is that Mr. O'Brien had a better opportunity to observe the Grievant's daily activities than any higher supervisor. Several top supervisors never personally met this Grievant. They must have obtained their knowledge of her conduct from the actual observations made by their subordinates. We have fully considered the arguments advanced in the Petition concerning this first question and find them devoid of merit.

The second question raised by OPM's Petition is whether it was inappropriate for the Arbitrator to consider the fact that the Agency had granted the Grievant a within grade increase three days after the letter of proposed adverse action was issued to Grievant on October 13, 1981. The Arbitrator gave very little weight to this unique fact and his decision would have been unchanged if it did not exist. It seemed inappropriate to totally ignore that this increase in compensation was predicated upon a certification that the Grievant was then performing in all aspects of her position at a satisfactory level. The investigation of the Grievant's activities had been completed weeks prior to this certification

and sufficient time was available to verify whether or not Grievant was performing competently in all aspects of her position. When considering the reinstatement of any employee, it is prudent to consider whether it would require the retention of an incompetent. The gratitious assumption that this matter was a determinative factor in our decision, is without any foundation. In fact, this trivial aspect of our decision may safely be ignored.

The Petition maintains stoical silence concerning one aspect of the case to which we attributed considerable significance: the disparity of punishment that existed between the Grievant and prior offenders employed by this Agency. In re *Pierno*, a white male, GS 13 Revenue Agent, was given a 10 day suspension (which penalty later was reduced by an Arbitrator to a written reprimand) for making false notations on Agency documents. The Grievant, a black female, Tax Auditor GS-9 was removed from the Service for false entries, which were similar but not identical infractions. This disparity was never adequately explained to this Arbitrator. Rule 6 in *Douglas*, as well as basic justice, requires that there must be reasonable consistency in the penalty imposed upon guilty employees for similar offenses.

We have reviewed and reconsidered our Opinion and Award of November 12, 1982. Only two trivial corrections are appropriate. On page 12 of that Opinion, line 4 from the top, the article "a" should be inserted between words ten and eleven. As corrected, it will read "upon a supervisor's". On page 13 of that Opinion, line 26 from the top (line 4 from the bottom of the page) contains a typographical error. The ninth word "effect" is incorrect and is hereby deleted and the intended word "effort" is substituted in lieu thereof.

We have carefully studied the entire Petition and find as a fact that it lacks merit and must be denied.

SUPPLEMENTAL AWARD AND ORDER

§ 1. The Petition for Reconsideration of Stay of Arbitration Award, submitted on behalf of the United States Office of Personnel Management, is denied.

§ 2. The Internal Revenue Office Service, Baltimore District Office, is directed to comply with the Award dated November 12, 1982 and to reimburse the Grievant for all back wages and other contractual benefits lost on and after December 8, 1982.

§ 3. The Union's request for counsel fees for professional services on and after December 8, 1982, is held in abeyance until after it is ultimately determined whether the Grievant is the prevailing party in the efforts to enforce the Award dated November 12, 1982. If the Grievant ultimately is the prevailing party, the subsidiary issue of whether the granting of attorneys fees would be in the interest of justice, may then, at the Union's election, be pursued. The Arbitrator hereby retains jurisdiction of the issue of granting attorneys fees until 60 days after final resolution of all appellate procedures on the basic dispute.

/s/ Clair V. Duff
CLAIR V. DUFF
Arbitrator

January 19, 1983

Pittsburgh, Pennsylvania

VERIFICATION

COMMONWEALTH OF PENNSYLVANIA)
) ss.
COUNTY OF ALLEGHENY)

Before me, the undersigned authority, a Notary Public, in and for the above named County and Commonwealth, personally appeared CLAIR V. DUFF, known to me to be the Arbitrator described in the foregoing Opinion, who signed the same in my presence and acknowledged before me that he executed the same.

/s/ Esther M. Ravita
ESTHER M. RAVITA
Notary Public

Dated: January 19, 1983

COMMITTEE ON LEGAL ETHICS
THE DISTRICT OF COLUMBIA BAR
OPINION NO. 176

ETHICAL PROPRIETY OF UNION ATTORNEYS' RECEIVING A MARKET VALUE FEE AWARD

It is not unethical for union attorneys to receive a market value fee award that is deposited in a legal assistance fund used only by attorneys to provide legal services for union members.

APPLICABLE CODE PROVISIONS

- DR 3-101(A)—A lawyer shall not aid a non-lawyer in the unauthorized practice of law
- DR 3-102(A)—A lawyer shall not share legal fees with a non-lawyer
- DR 5-107(8)—A lawyer shall not permit the entity that employs him to direct or regulate his professional judgment

INQUIRY

The committee has received two similar inquiries that ask whether it is unethical under the District of Columbia Code of Professional Responsibility for a salaried attorney employed by a federal employee labor union to accept an attorney's fee award calculated at the prevailing market rate when such fees will be deposited in the union's separate legal representation fund. The funds involved apparently are used solely by the unions' lawyers to finance legal work for their members. Awards of legal fees benefit the unions by allowing them to forego expending funds for such legal work.

DISCUSSION

These inquiries are prompted by the decision of the United States Court of Appeals for the Federal Circuit

in *Goodrich v. Department of the Navy*, 733 F.2d 1578 (Fed. Cir. 1984). That opinion limits fee awards to a union's salaried attorneys to the actual amount the union expended in providing legal representation, *i.e.*, the lawyer's salary plus the union's overhead expenses. The court, relying on various ethical considerations discussed below, ruled that labor union attorneys may not be awarded market value for their services.

Goodrich relied on *National Treasury Employees Union v. Department of the Treasury*, 656 F.2d 848 (D.C. Cir. 1981). There the Court of Appeals for the District of Columbia Circuit, citing three disciplinary rules, limited a union's recovery of attorneys' fees to the union lawyer's salary plus the union's expenses. The court cited DR 2-103(D)(4)(a) of the American Bar Association Model Code of Professional Responsibility, which then permitted lawyers to work for an organization providing prepaid legal services only if "[s]uch organization, . . . is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers. . . ."[1] The court also relied on DR 3-102, which prohibits lawyers from sharing fees with non-lawyers, and on DR 3-101(A), which prevents a lawyer from assisting laymen in the unauthorized practice of law.

The union involved in *National Treasury* had acknowledged that all fees awarded its attorneys were deposited *in the union's general* treasury. The court found that the union "would profit—perhaps handsomely—on legal activities of [its] lawyers under any arrangement whereby market-value fees wend their way into the union's general treasury." *Id.* at 852. However, the Court remarked that market value fee awards "are appropriate when the monies are to become the attorney's own; perhaps, too, such allowances would withstand criticism when the *monies are directed into a fund for main-*

[1] Such a provision is no longer in the ABA's Model Rules.

tenance of a legal services program." (emphasis added) *Id.* at 855.

Taking comfort from this last statement, the unions involved in the present inquiries and other public employee unions have established separate litigation or legal representation funds into which all fee awards are deposited. The monies in such funds generally are available only to the unions' attorneys to defray legal representation costs.

The District of Columbia Circuit has approved this type of arrangement. In *Jordan v. Department of Justice*, 691 F.2d 514 (D.C. Cir. 1982), an attorney at the Institute for Public Representation at Georgetown University Law Center was awarded market rate compensation for his successful representation in a Freedom of Information Act litigation. The Court "assume[d]" that the Institute would deposit any fee award beyond recoupment of actual expenses into a fund maintained "exclusively for litigation."[2] The Court cited its holding in *National Treasury* "that it is improper for an entity not licensed to practice law to partake in attorneys' fees representing the market value formula . . . *where its portion is not to be placed in a fund dedicated solely to litigation.*" 691 F.2d at 516, n.14. If this were not done, the court indicated, such an entity "would participate in a long-prohibited division of fees with an attorney." *Id.*

The Federal Circuit in *Goodrich* failed to cite *Jordan* in finding the receipt of market value attorney fees unethical. Rather, the Federal Circuit relied on the Merit Systems Protection Board's[3] ruling in *Wells v. Schweiker*,

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[2] Because we perceive no conceptual reason not to do so, we interpret this last phrase to include funds maintained exclusively for legal assistance that involves legal work other than just litigation.

[3] The MSPB is an administrative agency that, *inter alia*, decides challenges by federal employees to adverse personnel actions.

82 FMSR ¶ 7053 (1982), which concluded that, even if attorney's fees are used solely for legal representation, the market value formula still allows a union "to profit from the underlying activities of its attorneys" to the extent that the union need not "financ[e] its litigation activities through its general revenue funds." *See also*, in the same vein, *Powell v. Department of the Treasury*, 81 FMSR ¶ 7076 (1981), also cited in *Goodrich*. The *Goodrich* court, *supra* at 1579-80, quoted the observation in *National Treasury* that "the settled expectation of the union employer and the employed attorneys that all fees recovered belong to the union means that the employing lay organization would capitalize on the attorney's services, *reap a profit therefrom*, and put the monies thus made to any use it so chooses." *National Treasury*, *supra*, at 853. (emphasis added).

Thus, the two federal appellate courts that sit in the District of Columbia have reached different conclusions as to the ethical propriety of receiving market rate fee awards for deposit into a separately maintained legal assistance fund. We, of course, are not empowered to resolve conflicts among the circuits as to matters of federal law, a task we leave to the Supreme Court. Our opinion is limited strictly to an interpretation of the District of Columbia Code of Professional Responsibility. We find that the arrangements inquirers present are not forbidden by our Code.

As discussed above, the Federal Circuit in *Goodrich* relied on the ABA's DR 2-103(D)(4)(a) that prohibited a lay organization providing legal services from making a profit from its attorneys' work. ABA DR 2-103(D) specified those organizations that properly could recommend legal services to an individual in need of legal assistance. These included certain legal aid or public defender offices (DR 2-103(D)(2)), a bar-approved lawyer referral service (DR 2-103(D)(3)), and "any bona fide organization that recommends, furnishes or pays for

legal services to its members", provided it met numerous conditions (DR 2-103(D)(4)). One of these conditions was that "[s]uch organization . . . is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers. . . ." DR 2-103(D)(4)(a).

However, the District of Columbia Court of Appeals chose not to adopt the ABA's DR 2-103(D) and the District of Columbia Code thus does not expressly prohibit a lay organization from profiting in these circumstances. We believe the Court's failure to adopt the ABA's DR 2-103(D)(4)(a) is significant. At the least it indicates that, in this jurisdiction, it is not improper, so long as other Code provisions are not contravened, for an organization to "profit" indirectly from the legal services it recommends to its members.

This conclusion also informs our interpretation of other pertinent provisions that *are* in effect in the District of Columbia. Those are DR 3-102, which prohibits a lawyer from sharing legal fees with a non-lawyer, and DR 3-101(A), which prohibits a lawyer from aiding a non-lawyer in the unauthorized practice of law. These two provisions, in our view, must be read in light of the District of Columbia Court of Appeals' refusal expressly to prohibit an organization from profiting from the legal services it recommends to its members.

It is unclear whether a market value fee award necessarily would violate DR 3-102 and DR 3-101(A) even if it were not deposited in a separate legal assistance fund.[4] It is, however, clear that no ethical restriction exists under either of these two rules where mark[illegible]

[4] We decide only the issues before us, which involve separate legal representation funds. We reserve for another day and another factual situation the question whether the receipt of a market value award would be unethical if it were not deposited in a separate legal assistance fund.

value fees are placed in a separate fund to be used solely by the union's lawyers to finance legal assistance, even if the umbrella organization receives some indirect benefit from this arrangement. The *Jordan* case concludes that such a situation does not amount to "a long-prohibited division of fees with an attorney." 691 F.2d at 516, n.14. In other words, at least where there is a separate legal assistance fund, fees are not "shared" with a lay entity, as that term is used in the Code.

Moreover, as EC 3-8 notes, a principal purpose of these provisions is to prevent laymen from practicing law. At least in the circumstance where the fees are deposited in an account that is separate from the union's general treasury and used only by union lawyers for legal assistance, we do not believe a union is encouraged to practice law by market rate fee awards. Nor do we believe that the attorneys' independent professional judgment will be compromised in this situation since the clients and the union that recommends counsel to them normally have the same goals. *See* DR 5-107(A); Opinion 93. *Cf. NAACP v. Button*, 371 U.S. 415, 443 (1963).

Our decision in these regards is influenced by two other factors. First, it appears that many fee awards pursuant to the over 100 federal fee shifting statutes must be made at market value rates. *See Blum v. Stenson*, 104 S. Ct. 1541 (1984).[5] To hold that such awards are impermissible in the present circumstances would appear to create a conflict between federal law and ethical requirements.

Secondly, as the sample cases cited in the Appendix indicate, many market value fee awards have been made

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[5] In *Blum* the Court said (at 1547):

> The statute and legislative history establish that "reasonable fees" under [42 U.S.C.] § 1988 are to be calculated according to the prevailing market rates in the relevant community, *regardless of whether plaintiff is represented by private or nonprofit counsel.* (emphasis added).

to attorneys for "umbrella" organizations, including civil rights and environmental organizations. We hesitate to issue a ruling that might unduly restrict fee awards to such organizations in the absence of a clear signal from the District of Columbia Court of Appeals that this was intended. That signal is missing. To the contrary, the Court's declination to adopt a provision preventing such organizations from profiting from legal services strongly indicates that the present arrangement does not contravene our Code.

Inquiry Nos. 86-2-12
86-8-32

Adopted October 21, 1986

APPENDIX

Decisions Sanctioning Market Rate Fees Where Non-Profit Umbrella Lay Organizations Involved

DISTRICT OF COLUMBIA CIRCUIT: *Environmental Defense Fund v. E.P.A.*, 672 F.2d 42 (1982); *Sierra Club v. Gorsuch*, 684 F.2d 972 (1982), *rev'd on other grounds*, —— U.S. ——, 103 S. Ct. 3274 (1983) (Sierra Club and Environmental Defense Fund); *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319 (1982) (Corporate Accountability Research Group).

FIRST CIRCUIT: *Palmigiano v. Garrahy*, 616 F.2d 598 (1980) (ACLU National Prison Project); *Reynolds v. Coomey*, 567 F.2d 1166 (1978) (NAACP LDF).

SECOND CIRCUIT: *Carey v. New York Gaslight Club*, 598 F.2d 1253 (1979), *aff'd*, 447 U.S. 54 (1980) (NAACP); *Beazer v. New York City Transit Authority*, 558 F.2d 97 (1977), *rev'd on other grounds*, 440 U.S. 568 (1979) (Legal Action Center); *Torres v. Sachs*, 538 F.2d 10 (1976) (Puerto Rican Legal Defense Fund).

THIRD CIRCUIT: *Pawlak v. Greenawalt*, 713 F.2d 972 (1983) (Public Citizen Litigation Group).

FOURTH CIRCUIT: *Tillman v. Wheaton-Haven Recreation Association*, 517 F.2d 1141 (1975) (ACLU).

SIXTH CIRCUIT: *Louisville Black Police Officers Organization v. Louisville*, 700 F.2d 268 (1983) (NAACP LDF); *Northcross v. Board of Education of Memphis*, 611 F.2d 624 (1979), *cert. denied*, 447 U.S. 911 (1980) (NAACP LDF).

SEVENTH CIRCUIT: *Gautreaux v. Chicago Housing Authority*, 690 F.2d 601 (1982) (ACLU); *Mary and Crystal v. Ramsden*, 635 F.2d 590 (1980) (Youth Policy and Law Center).

NINTH CIRCUIT: *Brandenburger v. Thompson*, 494 F.2d 885 (ACLU).

TENTH CIRCUIT: *Ramos v. Lamm*, 713 F.2d 546 (1983) (ACLU); *Love v. Mayor*, 620 F.2d 235 (1980) (ACLU).

DISTRICT COURTS: *Schwabenbauer v. Board of Education*, 515 F. Supp. 33 (W.D.N.Y. 1983) (New York State United Teachers); *National Trust for Historic Preservation v. Corps of Engineers*, 570 F. Supp. 465 (W.D. Ohio 1983); *Allen v. Terminal Transport Co.*, 486 F. Supp. 1195 (N.D. Ga. 1980) *aff'd*, 638 F.2d 1232, *cert denied*, 445 U.S. 989 (1982) (Washington Research Project); *Unemployed Workers Organizing Committee v. Batterton*, 477 F. Supp. 509 (D. Md. 1979) (ACLU Baltimore); *Gunther v. Iowa State Men's Reformatory*, 466 F. Supp. 367 (N.D. Iowa 1979) (Iowa CLU); *Howard v. Phelps*, 443 F. Supp. 374 (E.D. La. 1978) (ACLU); *Harkless v. Sweeney Independent School District*, 466 F. Supp. 457 (S.D. Tex. 1978), *aff'd*, 608 F.2d 594 (5th Cir. 1979) (NAACP LDF); *Keyes v. School District No. 1*, 439 F. Supp. 393 (D. Colo. 1977) (Mexican American Legal Defense and Education Fund, NAACP LDF); *AFGE v. Rosen*, 418 F. Supp. 205 (N.D. Ill. 1976) (American Federation of Government Employees); *ASPIRA of New York, Inc. v. Board of Education*, 65 F.R.D. 541 (S.D.N.Y. 1975) (Puerto Rican Legal Defense and Education Fund), *Consumers Union of the United States v. Board of Governors*, 410 F. Supp. 63 (D.D.C. 1975); *Swann v. Charlotte Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975) (NAACP LDF).

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No. 86-1613

In the Supreme Court of the United States

OCTOBER TERM, 1986

NATIONAL TREASURY EMPLOYEES UNION, PETITIONER

v.

CONSTANCE HORNER, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner challenges the court of appeals' holding that fee awards to it under the Equal Access to Justice Act (EAJA), 28 U.S.C. (& Supp. III) 2412(d)(2)(A), are limited to the actual costs it incurs in employing in-house staff attorneys to litigate on behalf of its members.

1. This case arises from petitioner's representation of a member employee of the Internal Revenue Service in arbitration and judicial proceedings concerning the decision of the Office of Personnel Man-

agement to remove the employee for cause.[1] While sustaining the agency's finding of misconduct by the employee, the arbitrator mitigated the penalty to an 11-month suspension (Pet. App. 17a-32a) and thereafter denied OPM's petition for reconsideration (*id.* at 33a-41a). OPM unsuccessfully petitioned the Federal Circuit for review of the arbitrator's decision (*id.* at 13a-16a).

Petitioner thereafter sought an award of attorney fees under the Back Pay Act, 5 U.S.C. 5596, for time spent representing the employee before the arbitrator, and under EAJA for time spent representing the employee in the court of appeals. The Federal Circuit denied petitioner's request for fees under the Back Pay Act, a denial that petitioner does not challenge here, but it granted in part petitioner's request for fees under EAJA (Pet. App. 2a-3a). Petitioner sought fees for 183.75 hours at an hourly rate of $75, the maximum permissible under EAJA absent a showing of special circumstances (Pet. App. 4a; 28 U.S.C. (& Supp. III) 2412(d)(2)(A)(ii)). The court of appeals refused to make an award at this rate. Applying its prior decision in *Goodrich* v. *Dep't of the Navy*, 733 F.2d 1578 (1984), cert. denied, 469 U.S. 1189 (1985), and the D.C. Circuit's decision in *National Treasury Employees Union* v. *United States Dep't of Treasury*, 656 F.2d 848 (1981), as well as the general practice of the Merit Systems Protection Board,[2] the court held that petitioner's fees should not

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[1] The agency had found that the employee, Ms. Zazenda Smith, had "falsified documents to enhance her performance record as a GS-9 auditor, and had made false verbal statements to her supervisor" (Pet. App. 13a-14a).

[2] *O'Donnell* v. *Dep't of the Interior*, 2 M.S.P.R. 445 (1980); *Wells* v. *Schweiker*, 14 M.S.P.R. 175 (1982); *Powell* v. *Dep't*

incorporate any profit element but rather should be based on its cost of employing the staff attorneys involved (Pet. App. 3a-10a).[3]

The court grounded its holding on the undisputed facts that the prevailing attorneys "were salaried employees of the union, and * * * that the fee, if awarded, would go to the union" (Pet. App. 7a). An award of market rate fees to petitioner, the court ruled (*ibid.*), would thus contravene ethical standards set forth in the ABA's Model Code of Professional Responsibility. As the court explained, Disciplinary Rule (DR) 2-103(D)(4)(a) provides that a lay organization's prepaid legal services plan must be so "organized and operated that no profit is derived by it from the rendition of legal services by lawyers." In addition, the ABA's DR 3-102 and DR 3-101(A) prohibit attorneys from splitting fees with lay organizations and from assisting laymen in the unauthorized practice of law.[4] Finding "[n]othing in the EAJA or its legislative history indicat[ing] that courts should ignore these safeguards," the court concluded that continued adherence to these principles is appropriate to "protect the public from irresponsible and incompetent law practice when awarding attorney fees under the EAJA" (Pet. App. 7a).

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of the Treasury, 19 M.S.P.R. 174 (1984); *Allen* v. *Dep't of the Treasury*, 20 M.S.P.R. 518 (1984).

[3] This cost, the court ruled, was to be based on the attorneys' salaries and the overhead incurred by petitioner in connection with this case (Pet. App. 10a). Petitioner accordingly was awarded a fee of $5,965.12 (*id.* at 12a), rather than the $13,781.25 it would have received under its calculations.

[4] DR 3-101(A) provides that "[a] lawyer shall not aid a non-lawyer in the unauthorized practice of law." DR 3-102 provides in pertinent part that "[a] lawyer or law firm shall not share legal fees with a non-lawyer."

The court emphasized that its ruling is limited to those situations where a union has chosen not to establish a separate legal representation fund that is "fully supportive of the union's litigation activities" (Pet. App. 9a). The court also noted that its ruling does not prohibit market rate awards "directly to the attorneys, [who] could, in turn, reimburse the union for its actual expenses, or as they are allowed to do in any case, make a charitable contribution to any organization they see fit" (*ibid.*). The court found no indication in this case, however, that the fees awarded would go to the attorneys individually rather than to the union. And while the union here had established a separate legal representation account, that account was subsidized in large part by the union's general treasury and hence was not "fully supportive of the union's litigation activities" (*ibid.*). The court thus could "see no reason to ignore the rules of ethics that the legal profession maintains to ensure its integrity" (*ibid.*).

2. Petitioner contends that the decision below is contrary to EAJA and in conflict with the D.C. Circuit's decision in *Jordan* v. *United States Dep't of Justice*, 691 F.2d 514 (1982), and the Ninth Circuit's decision in *Curran* v. *Dep't of the Treasury*, 805 F.2d 1406 (1986). However, application of ethical principles in this case is not precluded by EAJA, which is completely silent on the subject. While the decision below appears inconsistent with the Ninth Circuit's reasoning in *Curran* and with dicta in the D.C. Circuit's decision in *Jordan*, there is not a direct conflict in holdings. In any event, for the reasons set forth below, any inconsistency in reasoning is of limited importance and not likely to recur with any frequency. Review by this Court is therefore not warranted.

a. Petitioner's primary contention (Pet. 7-9) is that an award of fees at other than market rates is inconsistent with the general instruction in EAJA that fee awards are to be "based upon prevailing market rates for the kind and quality of the services furnished" (28 U.S.C. (& Supp. III) 2412(d)(2)(A)). This argument is without merit. We do not dispute, of course, that under the general principles set out in *Blum* v. *Stenson*, 465 U.S. 886 (1984), fees to non-profit organizations are generally based on prevailing market rates. However, nothing in *Blum* or in EAJA is inconsistent with the paramount obligation of the courts to ensure that relevant ethical considerations are observed by attorneys practicing before them.[5] Disallowance of fees otherwise authorized has been repeatedly ordered by courts in a variety of situations where necessary to enforce ethical considerations. See, *e.g.*, *Woods* v. *City Nat'l Bank & Trust Co.*, 312 U.S. 262, 268 (1941); *In re Eastern Sugar Antitrust Litigation*, 697 F.2d 524, 533 (3d Cir. 1982); *In re New York, New Haven &*

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[5] Petitioner suggests (Pet. 11-14) that there is actually no ethical problem here at all because, in its view, its organizational arrangements have overcome the fee-splitting and unauthorized-practice-of-law restrictions of the ABA Disciplinary Rules. Petitioner overlooks, however, the requirement of DR 2-103(D)(4)(a) that attorneys may not work for a lay organization that derives a profit from its rendition of legal services. See pages 9-10, *infra*. As the D.C. Circuit has noted (*National Treasury Employees Union*, 656 F.2d at 851), these Rules are "due great deference," not only because they "enshrine[] the collective wisdom of the legal profession on what is acceptable behavior" and "derive * * * considerable force from the power of the bench and bar to discipline errant attorneys," but also because "they afford the public its best assurance of competent and responsible legal service."

Hartford R.R., 567 F.2d 166, 176 (2d Cir.), cert. denied, 434 U.S. 833 (1977). Congress in enacting EAJA surely did not intend that the courts should ignore this well-established practice.

Despite its contention that EAJA's language invariably compels payment of fees at "prevailing market rates," petitioner itself appears to acknowledge the need for *some* exceptions based on ethical considerations. For example, when it created "a separate account into which all fees would be allocated, to be used solely for funding litigation" (Pet. 10-11), petitioner evidently recognized that ethical rules bar the payment of market rate fees if such fees are simply deposited into a union's general treasury. Thus, the question here is not, as petitioner suggests, whether EAJA *ever* permits an award of fees at other than market rates. The question, rather, concerns the scope of the ethical considerations that call for a departure from EAJA's "prevailing market rate" norm.

Petitioner is also incorrect in asserting that the ruling below will have widespread consequences beyond the particular situation involved here, *viz.*, the provision by a labor union of prepaid legal services to its federal employee members. The court expressly disavowed any application of its ruling to legal aid organizations, such as those involved in *Blum*, "where the organization exists solely to provide legal help" (Pet. App. 9a).[6] Indeed, the court of appeals made

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[6] As the D.C. Circuit explained in *Nat'l Treasury Employees Union*, 656 F.2d at 853-854:

> The Code of Professional Responsibility permits a lawyer to divide fees [with or] distribute them to other members of his "law firm or law office" [DR 2-107], and we see no reason why this authorization should not extend

clear that petitioner itself could secure the payment of market rate fees by restructuring its operations. The court left open the possibility that a fully self-supporting litigation fund would pose no ethical problems requiring a fee limitation. And the court also made plain that market rate fees could be awarded directly to the attorneys involved (*ibid.*). In short, the court's ruling applies only where, as here, the litigation fund is supported by the general funds of the non-lawyer organization, so that the organization as a whole would derive a direct benefit from the profits inherent in any award of market-based fees.[7]

b. Petitioner also asserts (Pet. 9-11) that the decision below is in "square conflict" with the D.C. Circuit's decision in *Jordan* and the Ninth Circuit's holding in *Curran*. The supposed conflict with *Jordan*, however, was presented by the petitioner in *Goodrich* v. *Dep't of the Navy*, No. 84-577, seeking review of a prior Federal Circuit decision on which the decision below was based. See Pet. App. 5a-9a (discuss-

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to public as well as private legal practitioners. The same principle leaves a salaried attorney at liberty to surrender his fees to a public interest organization dedicated entirely to litigative activities.

[7] We are not aware of any such organizations likely to be eligible for EAJA awards other than unions of government employees which, like petitioner, provide prepaid legal services. In fact, all of the cases that have considered this issue to date—apart from *Jordan*, which involved another federal employee union—have concerned efforts by the instant petitioner to recover attorney fees. Because of the net worth limitations on those eligible for EAJA fee awards (28 U.S.C. (& Supp. III) 2412(d)(2)(B)), it is unlikely that in-house counsel of for-profit corporations would often have occasion to seek an award of attorney fees under EAJA (see Pet. 12 n.9).

ing *Goodrich*). Certiorari in *Goodrich* was nevertheless denied. 469 U.S. 1189 (1985). In opposing certiorari there, we explained that there was no conflict between *Jordan* and the Federal Circuit's approach. See 84-577 Resp. Br. in Opp. at 12-13 n.4. Our discussion in *Goodrich* is sufficient to dispose of petitioner's similar allegation of a conflict between *Jordan* and the Federal Circuit's decision here.[8]

There is likewise no square conflict in holdings between the decision below and the Ninth Circuit's decision in *Curran*. The decision in *Curran* did not involve EAJA. Rather, the Ninth Circuit held that the Merit Systems Protection Board (MSPB) had erred in awarding fees to the National Treasury Employees Union under the Back Pay Act on the basis of the Union's costs rather than a market rate. In so holding, the Ninth Circuit did disagree with the reasoning employed by the Federal Circuit in *Goodrich* and in the instant case. There is thus a conflict in reasoning between the two courts.

This conflict in reasoning, however, is of little continuing importance, which is one of the factors that led us not to seek certiorari in *Curran*. As the Ninth Circuit itself noted in *Curran*, the Back Pay Act issue was before it, as a regional circuit, solely because "the matter was pending in our circuit on October 1, 1982, the cutoff date for the transfer of MSPB appeals to the Federal Circuit under the Federal Courts Improvement Act" (805 F.2d at 1407, citing 28 U.S.C. 171 note and 5 U.S.C. 7703(b)(1)). Since the Federal Circuit now has exclusive jurisdiction over almost all appeals from MSPB decisions, the conflict created by the decision in *Curran* will

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[8] That discussion is reproduced at App., *infra*.

rarely arise outside the very small universe of cases involving union pre-paid legal services which, like *Curran*, were pending in a regional circuit on October 1, 1982.[9]

c. Equally unpersuasive is petitioner's reliance (Pet. 11-14) on D.C. Bar Comm. on Legal Ethics, Op. 176 (1986). The District of Columbia Bar there concluded that a non-fully-self-supporting litigation fund maintained by a union would not violate the D.C. Bar's Code of Professional Responsibility. While relying heavily on this Opinion, petitioner overlooks the fact that the D.C. Code, as adopted by the District of Columbia Court of Appeals, does not include DR 2-103(D)(4)(a), which was the basis of the Federal Circuit's ruling in *Goodrich* and in this case. As we have noted (page 3, *supra*), DR 2-103(D)(4)(a) provides that a lay organization's prepaid legal services plan must be so "organized and operated that no profit is derived by it from the rendition of legal services by lawyers." In Opinion 176, the D.C. Bar found the omission of this Disciplinary Rule from the D.C. Code to be controlling, stating that "[w]e believe that the [Court of Appeals'] failure to adopt the ABA's DR 2-103(D)(4)(a) is sig-

[9] We note that attorney fees under the Back Pay Act may be ordered in cases other than those brought before the MSPB. For example, if an employee successfully obtains improperly withheld pay or benefits, the employee may be entitled to Back Pay Act attorney fees. However, district court jurisdiction in any such suit would be under the Little Tucker Act, 28 U.S.C. 1346(a)(2). Accordingly, any appeal from such a decision awarding fees would be to the Federal Circuit under 28 U.S.C. 1295(a)(2). See generally *United States* v. *Hohri*, No. 86-510 (June 1, 1987). Similarly, review of EAJA claims in cases brought under the Little Tucker Act would lie exclusively in the Federal Circuit.

nificant. At the least it indicates that, in this jurisdiction, it is not improper, so long as other Code provisions are not contravened, for an organization to 'profit' indirectly from the legal services it recommends to its members" (Op. 176, at 6). Accordingly, Opinion 176 is not contrary to the Federal Circuit's reliance on, and interpretation of, DR 2-103(D)(4)(a) as embodying the appropriate ethical standard for the practice of law before the Federal Circuit.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JUNE 1987

APPENDIX

Brief for the Respondent in Opposition at 12 n.14, *Goodrich* v. *Dep't of the Navy*, No. 84-577:

> In *NTEU*, the court expressly refrained from deciding whether the ethical problem presented by payment of market value attorney fee awards to unions would be resolved if the monies were directed to a fund for maintenance of a legal services program. 656 F.2d at 855. Petitioner asserts (Pet. 16) that this question was settled in *Jordan* v. *United States Department of Justice*, 691 F.2d 514 (D.C. Cir. 1982). *Jordan* arose under the Freedom of Information Act. The district court denied an award of attorney fees for work performed by the legal staff of the Institute for Public Representation at Georgetown University Law Center because the application was not supported by appropriate documentation. The court of appeals reversed and, in passing, mentioned the *NTEU* decision in a footnote. 691 F.2d at 516 n.14. The court there simply stated that it "assume[d]" for purposes of the appeal that, should the Institute share in any attorney fee award beyond recoupment of its own expenses, it would maintain a fund exclusively for litigation, into which its share would be deposited. The court noted that, in *NTEU*, the question whether such a separate fund would resolve the ethical questions was not presented. *Ibid.*
>
> The *Jordan* decision does not make clear the fee relationship between the Institute and the attorneys representing Mr. Jordan or whether pay-

ment would be made to the Institute or directly to the lawyers. In any event, the question of a separate account was not presented in *Jordan*, just as it was not in *NTEU*, and we therefore cannot assume that the court intended to resolve it in so casual a manner in a footnote, since to do so would sanction a possible circumvention of the ethical concerns raised in *NTEU*.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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REPLY MEMORANDUM

LOIS G. WILLIAMS *
Director of Litigation

ELAINE KAPLAN
Assistant Director of Litigation

NATIONAL TREASURY
EMPLOYEES UNION
1730 K Street, N.W., Suite 1100
Washington, D.C. 20006
(202) 785-4411

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY MEMORANDUM

Nothing in the government's opposition to our petition for a writ of certiorari even remotely supports the correctness of the lower court's decision, which is in square conflict with the rulings of two other courts of appeals. We recognize, of course, that this Court does not sit merely to correct errors by the lower courts, regardless of how plain those errors may be. Nonetheless, the lower court's errors in this case merit review because they necessarily place in jeopardy the rights of all unions, nonprofit organizations, and corporations to recover statutorily mandated market rate attorney fees against the government, under a broad variety of fee shifting stat-

utes, designed to vindicate important rights. This Court's intervention is, moreover, particularly necessary here, because the Federal Circuit has exclusive jurisdiction over many actions in which the government is a defendant and is liable for payment of attorney fees to a prevailing party. That court has demonstrated in this case that absent action by this Court, it intends to erroneously deny market rate fees to unions in every instance, even where, as here, Congress has explicitly ordered that fees be awarded at prevailing market rates.

1. The government claims that notwithstanding the contrary opinions of the Ninth Circuit in *Curran* v. *Department of Treasury*, 805 F.2d 1406 (1986), the D.C. Circuit in *Jordan* v. *Department of Justice*, 694 F.2d 514 (1982), and the D.C. Bar's Committee on Legal Ethics in Opinion No. 176, the lower court's departure from the EAJA's explicit prevailing market rate standard for awarding attorney fees was justified by ethical requirements governing the legal profession. This claim, which essentially parrots the lower court's "analysis" without additional support, is plainly meritless.

a. Apparently, the government's entire defense of the lower court's decision is now grounded in ABA Disciplinary Rule 2-103 (D) (4) (a). Opp. Mem. 9-10. That rule (which generally proscribes solicitation), states that an attorney may be recommended, employed, or paid by "any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries" so long as the organization is "organized and operated so that no profit is derived by it from the rendition of legal services by lawyers." The government claims that our reliance on D.C. Bar Opinion 176 (and that of the Ninth Circuit in *Curran*), "overlooks the fact that the D.C. Code [of Professional Responsibility] . . . does not include ABA Disciplinary Rule 2-103 (D) (4) (a), which was the basis of the Federal Circuit's ruling in *Goodrich* [v. *Department of the Navy*] and in this case." Opp. Mem. 9.

The simplest answer to the government's argument is that the Disciplinary Rule that it cites as crucial to the result the court reached below was repealed four years ago, when the ABA thoroughly revamped its Model Code of Professional Responsibility and replaced it with the Model Rules of Professional Conduct. The new model rules contain no analogous *per se* limitations on employment by legal services organizations.[1]

Moreover, even if the earlier rule upon which the government places reliance were still in effect, it would obviously not be violated or even implicated by the union's practice here. That rule was designed to discourage solicitation and interference with the attorney's professional judgment by laypersons interested in profit. Accordingly, it prohibited an attorney from accepting employment in, or promotion by an organization that derived a "profit" from the attorney's services. NTEU does not derive a "profit" from its litigation activities, for the reasons we

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[1] The ABA repealed the earlier rule because *per se* restrictions on attorneys' participation in various legal services plans or their in-house employment by lay organizations were considered outmoded and inconsistent with the legal profession's responsibility to deliver services to the widest number of persons. The ABA Commission on Professional Standards explained that the earlier "assumed equivalence between employment [by a lay organization] and interference with the lawyer's professional judgment is at best tenuous," and that *per se* restrictions were inconsistent with present practice, in which business corporations, insurance companies, and legal service organizations employed staff counsel. American Bar Association Commission on Evaluation of Professional Standards, Proposed Final Draft: Model Rules of Professional Conduct, pp. 175-178 (May 30, 1981); *see also*, ABA, The Legislative History of the Model Rules Of Professional Conduct: Their Development in the ABA House of Delegates, p. 160 (1987).

Rather than imposing a *per se* prohibition on employment by particular organizations, current rules simply address the underlying evils the earlier rules were designed to correct. They prohibit attorneys from sharing legal fees with non-lawyers and from allowing their lay employers to regulate their professional judgment in delivering legal services. Model Rule 5.4(a); 5.4(c).

have already set forth. And even the Federal Circuit did not suggest NTEU would be engaged in improper solicitation if fees were awarded at market rates.[2]

b. Finally, as we have argued, even assuming there were a real ethical concern at issue here, that concern is overridden by the explicit language and history of the EAJA, which specify that fees "shall" be awarded at prevailing market rates. *Cf. National Treasury Employees Union* v. *Department of the Treasury*, 656 F.2d 848, 851 & n.28 (D.C. Cir. 1981). The EAJA is hardly "silent" on this issue, as the government and the lower court have stated. *See*, Opp. Mem. 3, 4. Indeed, the EAJA is specifically targeted at assisting persons or corporations of relatively modest means—the very individuals and entities who utilize legal services provided by in-house counsel and unions or other non-profit organizations. The lower court's ruling turns the EAJA on its head, by denying prevailing rate fees in the very circumstances which were the focus of Congress' concern.

2. Because the lower court's ruling is so obviously incorrect, the government's most extensive efforts are devoted to minimizing its importance. These efforts are unavailing.

a. As the government notes, the lower court did indeed purport to "disavow" application of its novel ruling to

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[2] The government, in an apparent effort to either derogate the importance of this case or to divert the Court with irrelevant issues, repeatedly mischaracterizes NTEU's litigation program as a "pre-paid legal services plan." Opp. Mem. 3; 6; 7, n.7; 9. While the present case involves NTEU representation of a member in a personnel related proceeding, that representation was not pursuant to a "pre-paid plan." NTEU does not have a "pre-paid" plan; it provides attorneys in its discretion to both members and non-members seeking to vindicate a variety of constitutional and statutory rights before administrative and judicial tribunals. As we have already noted (Pet. 3; 13, n.10) receipt of this service is not an automatic benefit of membership, nor an obligation by the union, as it would be in a so-called "pre-paid" plan.

other "legal aid organizations" that, the court asserted, "exist solely to provide legal help." Opp. Mem. at 6, citing Pet. App. 9a. Although the government claims to be "unaware" of other organizations that would be affected by the lower court's ruling (Opp. Mem. 7, n. 7), as the D.C. Bar Committee on Legal Ethics notes, there are dozens of "umbrella" organizations, including civil rights and environmental groups, who would be precluded from obtaining prevailing rate fees under the lower court's reasoning. Pet. App. 48a-51a. Like NTEU and other unions, these organizations (such as the American Civil Liberties Union, the NAACP Legal Defense Fund, the Sierra Club, and others), also employ non-lawyers and engage in lobbying, educational, and other activities in addition to their representational work. These organizations would reap the same "benefit" as unions from an award of above cost fees, and accordingly would be subject to the same asserted ethical prohibition.[3]

b. Of course, even if the bizarre rule applied here were to hurt "only" labor unions (or even "only" those who represented Federal employees), the case would still warrant review. Unions are a prime source of legal assistance for persons of modest means who challenge unlawful government action and are entitled to awards under many fee-shifting statutes, including the various civil rights laws, the Fair Labor Standards Act, the

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[3] Although it hardly seems relevant, the government claims that all cases to have considered the issue presented here have involved efforts by NTEU or another federal union to recover fees. *See* Opp. Mem. 7, n.7. This claim is incorrect. *Jordan* v. *Department of Justice* concerned the right of the Institute for Public Interest Representation (a university affiliated law institute) to recover fees at prevailing rates under the Freedom of Information Act. In *McClean* v. *Arkansas Board of Education*, 723 F.2d 45, 47 (8th Cir. 1983), the court summarily rejected an argument that it would be unethical to award fees at market rates to the ACLU. The fact that few other courts have seen fit to follow the Federal Circuit's ruling is a testament to its lack of merit, not to the unimportance of the issue.

Privacy Act, or, as here, the Equal Access to Justice Act. Under the lower court's ruling, whose rationale the government is powerless to justify, unions could never recover prevailing market rate fees under any of these statutory schemes, despite explicit Congressional intent that all fees be awarded at prevailing market rates.[4]

c. The government finally contends that the conflict between the lower court's ruling and *Curran* is of "no continuing importance" (at least to the government) because the regional circuits no longer have jurisdiction over claims for fees under the Back Pay Act, like the claim at issue in *Curran*. This argument obviously proves too much; it would have this Court ignore the most outrageous injustices perpetrated by the Federal Circuit in matters now committed to its exclusive jurisdiction, even

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[4] The suggestion that NTEU should or could secure the prevailing market rate fees to which it is entitled merely by "restructuring its operations" is absurd. *See*, Opp. Mem. 4, 7. First, the government fails to explain how the devices the lower court suggested would resolve the so-called ethical problem. *See* Pet. 13, n.10. Moreover, the alternatives suggested are simply unfeasible; if they were not, we would not be pursuing review in this Court.

For example, the lower court suggested that the ethical problem would be resolved if litigation activities were entirely self supporting. Obviously, NTEU has no way of guaranteeing that its litigation fund is self supporting, unless it provides representation only in cases it is certain to win. And it is difficult to see how the union is less "benefitted" if it can rely completely on the fund to pay litigation expenses. Nor would it be practical to launder the award of fees through the attorneys themselves, as the lower court suggested. That practice would subject the staff attorneys to income tax liability on money that was never actually theirs and would elevate form over substance. There is nothing improper about employing salaried staff attorneys, and there is no justification for subjecting unions or non-profit organizations to additional unwieldly requirements under either the EAJA or the ABA Rules of Professional Conduct. Indeed, imposing those requirements is inconsistent with the ABA's recent decision to base ethical proscriptions, not on the structure of organizations, but on the evils those proscriptions were designed to address. *See, supra* at 3, n.1.

if every other circuit court had expressed a contrary view.[5]

Further, the Federal Circuit does not have exclusive jurisdiction over most claims for fees made by unions and similarly situated organizations. Regardless of whether the regional circuits will continue to adjudicate claims under the Back Pay Act (which is not, in any case, the statute at issue here), they will continue to adjudicate claims for fees by unions under the Equal Access to Justice Act, the civil rights acts, the Privacy Act, and others. The government's artificial distinctions notwithstanding (*see*, Opp. Mem., 8), the *Curran* court ruled, in direct conflict with the court's decision here, that it is not unethical for unions to receive fee awards at prevailing market rates. That ruling is equally, if not more applicable under other fee shifting statutes, including the EAJA, that specify the market rate standard must be applied. As the Ninth Circuit observed in *Curran*, "a Congressional decision to concentrate administrative or judicial decision making in specialized agencies or courts should not result in the atomization of the law with respect to attorney's obligations toward their clients." 805 F.2d at 1410. The prospect that unions will be

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[5] It is ironic that the government contends here that the exclusivity of Federal Circuit jurisdiction counsels against review of its plain legal error. If anything, the exclusivity of the court's jurisdiction should be considered a factor supporting review. Absent this Court's intervention, those unions that represent federal employees, and often appear before the Federal Circuit, will be irremediably denied their rights under fee shifting statutes in every case for which that court has exclusive jurisdiction. We note here that several administrative bodies have also adopted the erroneous rule applied by the Federal Circuit. *See*, cases of the Merit Systems Protection Board cited in Opp. Mem. at 2-3, n.2; *Health Care Financing Administration and NTEU Chapter 210*, 21 FLRA No. 106 (1986) (Federal Labor Relations Authority). MSPB decisions are reviewable exclusively by the Federal Circuit, and FLRA decisions reviewing arbitration awards are not judicially reviewable at all. *See*, 5 U.S.C. 7703(b)(1) and 7123(a)(1).

treated differently by different courts of appeals in identical circumstances is a classic example of a matter meriting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LOIS G. WILLIAMS
Director of Litigation

ELAINE KAPLAN
Assistant Director of Litigation

NATIONAL TREASURY
EMPLOYEES UNION
1730 K Street, N.W., Suite 1100
Washington, D.C. 20006
(202) 785-4411

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